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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-607

GEORGE HENSON MIREE, CLAUDE ESTES MIREE and DOROTHY ESTES MIREE, Minors, by and Through AUBREY S. MIREE, JR., and CLAUDE H. ESTES, JR., Co-Guardians of Said Minors,
Petitioners,

versus

DEKALB COUNTY, GEORGIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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INDEX

Page

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statement of the Case 3

Reasons for Granting the Writ 7

Conclusion 20

Appendix A: Court of Appeals en banc opinion of August 25, 1976 (review of which is sought) A-1

Appendix B: Court of Appeals panel opinion of January 30, 1976 ..... A-15

Appendix C: District Court Order of September 25, 1974 . A-32

Appendix D: District Court Order of June 27, 1974 .... A-37

CITATIONS

Cases

Bank of America Nat. T & S Asso. v. Parnell, 352 US 29 (1956) 10, 11, 12

Bossier Parrish School Board v. Lemon, 370 F(2) 847 (5th Cir. 1967) 17, 19

Brotherton v. Merritt-Chapman & Scott Corp., 213 F(2) 477 (2nd Cir. 1954) 14, 16

City of Inglewood v. City of Los Angeles, 451 F(2) 948 (9th Cir. 1972) 17, 19

Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) 10, 12

Gabel v. Hughes Air Corp., 350 F. Supp. 612 (C.D. Calif. 1972) 19, 20

Hancock County v. Williams, 230 Ga. 723, 198 S.E.(2) 659 (1973) 8

Hensley v. United States, 279 F. Supp. 548 (D. Mont. 1968) 14, 17

Housing Corporation of America v. United States, 468 F(2) 922 (US Ct. of Cl. 1972) 15, 16

In Re Paris Air Crash, 399 F. Supp. 732 (C.D. Calif. 1975) 20

Johnson v. Redevelopment Agency of the City of Oakland, Calif., 317 F(2) 872 (9th Cir. 1963) 15, 16

Lincoln County v. Luning, 133 U.S. 529 (1890) 8

Mahler v. United States, 306 F(2) 713 (3rd Cir. 1962) .. 15, 16

Nader v. Allegheny Airlines, — U.S. — (June 7, 1976) 12

National Surety Co. of New York v. Ulmen, 68 F(2) 330 (9th Cir. 1933) Cert. den. 292 U.S. 624 (1934) 14

Parden v. Terminal R. of Ala. Docks Dept., 377 US 184, reh. den. 377 US 1010 (1964) 20

Rauch v. United Instruments, Inc., 44 Law Week 2149 (Sept. 11, 1975) 19, 20

Rauch v. United Instruments, Inc., 44 Law Week 2289 (Dec. 17, 1975) 19, 20

Sayre v. United States, 282 F. Supp. 175 (N.D. Ohio, 1967) 16

Town of East Haven v. Eastern Airlines, Inc., 282 F. Supp. 507 (1968) 19, 20

United States v. Little Lake Misere L. Co., 412 US 580 (1973) 11

United States v. Orleans, — US — (June 1, 1976) 48 L Ed(2) 390 9

United States v. Seckinger, 397 US 203, reh den 397 US 1031 (1970) 10

Wallis v. Pan American Petroleum Corp., 384 US 63 (1966) 11, 12

West v. Morrison-Knudsen Company, 451 F(2) 493 (9th Cir. 1971) 13, 17

Other Authorities

C. Wright, Law of Federal Courts (2nd Ed. 1970) 18

Restatement [First] of Contracts § 145 (1932) 15

51 N.Y.U. Law Review 231 (May 1976) 20

28 U.S.C. § 1254(1) 2

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To the United States Court of Appeals for the Fifth Circuit

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, sitting en banc, entered in this case on August 25, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals en banc is not yet reported. It was an 8-5 opinion reversing a panel opinion of the Court of Appeals of January 30, 1976, which is reported at 526 F(2) 679. That opinion, in turn, was a reversal of orders of the United States District Court for the northern District of

Georgia, dated June 27, 1974, and September 25, 1974, which had dismissed Petitioners' claims against Respondent DeKalb County, Georgia. These opinions are all reproduced in the appendix attached hereto, with the en banc opinion of the Court of Appeals, review of which is here sought, appearing first in the appendix, at p. A-1.

JURISDICTION

The judgment of the Court of Appeals from which review is sought was rendered on August 25, 1976. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

QUESTIONS PRESENTED

1. Whether state law, or federal common law, determines the standing of third-party beneficiaries to sue on a grant agreement made between a county and the United States pursuant to the federal aviation laws.

2. Whether a federal court, sitting in diversity, can apply a federal common law rule with the effect of creating immunity from suit on contract for a county, when applicable state law would not grant immunity.

3. Whether federal common law adopts a restrictive rule for third-party beneficiary standing, or whether it is identical to the more liberal rule prevailing under state law.

4. Whether under federal law, a county can assert immunity from the consequences of its own gross fault in breach of safety provisions contained in an airport grant agreement with the United States, made expressly for the benefit of the users of the airport.

5. Whether there is an implied civil remedy under the federal aviation acts for death or personal injury caused by the breach of the safety standards contained in the federal aviation acts.

STATEMENT OF THE CASE

Mr. and Mrs. Richardson F. Miree were passengers in a jet airplane which crashed shortly after take-off from the DeKalb-Peachtree Airport, in DeKalb County, near Atlanta, Georgia, on February 26, 1973. They were killed, and are survived by three minor children who sue by their guardians. The cause of the crash was the ingestion of birds into the plane's jet engines as the plane cleared the end of the runway at take-off. Large flocks of birds were at the site, having been attracted by a garbage dump on the airport property immediately adjacent to the runway. The airport, including both the aviation facilities and the garbage dump, was owned and operated by DeKalb County.

The Miree children sued DeKalb County, as well as the corporate owners of the aircraft, and sued the United States, as the regulator of safety in all air travel and as operator of the control tower at the airport. A final order of the District Court dismissed the County on its pretrial motion to dismiss, on account of supposed governmental immunity from suit. The United States had filed cross-claims against the County, and those have not been dismissed.

The complaint sets forth facts supporting liability of the County on several grounds. Facts amounting to maintenance of a nuisance are alleged; negligence and wanton misconduct in permitting the garbage dump and its birds to remain near a jet runway are shown; misconduct in allowing a jet aircraft to take off at this particular time when flocks of bids were known

to be in the area of the runway is shown; and it is shown that maintenance of the garbage dump is in direct violation of a written contract between the County and the United States, of which contract these users of the airport were intended third-party beneficiaries.[1] Moreover, the fact of the County allowing

[1] The Complaint alleges that Defendant DEKALB COUNTY breached its contract with Defendant UNITED STATES. The contract attached to the complaint, marked Exhibit "A", contained the following agreements on the part of Defendant DEKALB COUNTY:

> "1. These covenants shall become effective upon acceptance by the Sponsor of an offer of Federal aid for the Project or any portion thereof made by the FAA and shall constitute a part of the Grant Agreement thus formed. These covenants shall remain in full force and effect throughout the useful life of the facilities developed under this Project, but in any event not to exceed twenty (20) years from the date of said acceptance of an offer of Federal aid for the Project.
>
> 2. *The Sponsor will operate the Airport as such for the use and benefit of the public.* . . . That Sponsor may prohibit or limit any given type, kind, or class of aeronautical use of the Airport if such action is necessary for the *safe operation* of the airport or necessary *to serve the civil aviation needs of the public.*
>
> * * * * * * *
>
> 6. The Sponsor will operate and maintain in a *safe* and serviceable condition the Airport and all facilities thereon and connected therewith which are necessary to serve the *aeronautical users* of the Airport other than facilities owned or controlled by the United States, and *will not permit any activity thereon which would interfere with its use for airport purposes.* . . .
> 11. The Sponsor will not enter into any transaction which would operate to deprive it of any of the rights and powers necessary to perform any or all of the covenants made herein, . . .
>
> 12. The Sponsor will keep up to date at all times an airport layout plan of the Airport showing . . . Such airport layout plan, and each amendment, revision or modification thereof, shall be subject to the approval of the FAA, which approval shall be evidenced by the signature of a duly authorized representative of the FAA on the face of the original layout plan. *The Sponsor will not make or permit the making of any changes or alterations in the Airport or any of its facilities other than in conformity with the airport layout plan as so approved by the FAA*, if such changes or alterations might adversely affect the *safety*, utility, or efficiency of the Airport.

the garbage dump and the associated bird hazard to continue, with full knowledge of the hazard to jet aircraft, and the continued allowing of jet aircraft traffic during a time when flocks of birds were known to be present, are allegations of facts supporting a finding of wilful and wanton misconduct by the County. The facts alleged also supported a conclusion that the County, by engaging in the business of running a full-service commercial airport facility, was engaged in a proprietary function in a federal sphere of activity in interstate commerce which resulted in an effective loss of any immunity from suit.

The District Court granted the motion of the County to dismiss; and the Miree plaintiffs took an appeal to the United States Court of Appeals for the Fifth Circuit.

That appeal was heard by a panel of Judges Morgan, Godbold, and Dyer. Judge Morgan (himself a Georgia lawyer and former U.S. District Judge in Georgia) wrote the opinion of the panel, for himself and Judge Godbold. The decision is reported in 526 F(2) 679 (1976) and is appended hereto at p. A-15. Judge Dyer dissented. The majority opinion, while finding that plaintiffs' negligence and nuisance claims were barred by the County's tort immunity, held that the plaintiffs had stated a claim as third-party beneficiaries of the contract between the Federal Aviation Administration and DeKalb County, citing Georgia's statutory and case law as applicable, which hold that counties are not immune from suit on contracts, including suits by intended thirty-party beneficiaries. Judge Dyer's dissent contended that because the contract in question was entered pursuant to federal statute, and because the United States was a party, that federal law must control its interpretation. He contended that under federal common

> 13. Insofar as it is within its power and to the extent reasonable, the *Sponsor will take action to restrict the use of land adjacent to or in the immediate vicinity of the Airport to activities and purposes compatible with normal airport operations including landing and takeoff of aircraft."* (Emphasis added.)

law, the contract would have to show not only an intent to benefit the plaintiffs (which is the requirement of Georgia law, clearly met by the language of the Grant Agreement) but also must manifest expressly an intent to compensate them in the event of its breach.

After publication of the panel opinion, the Fifth Circuit granted rehearing en banc on motion of the County. Of the thirteen members of the en banc Court, seven adopted as the opinion of the Court, per curiam, Judge Dyer's dissent from the panel opinion. One further member of the Court concurred. Five members of the Court, including the Chief Judge, dissented in an opinion by Judge Morgan; and the Chief Judge also dissented separately. The two dissenting opinions from the en banc decision, beginning at p. 5242 (Appendix, p. A-3), succinctly state the position presented by your petitioners here and make apparent the importance of a determination of these issues by the Supreme Court.

REASONS FOR GRANTING THE WRIT

The Court of Appeals split 8-5 on the important question of whether state law, or federal common law, should govern the rights of private litigants in claims arising out of a federal Aviation Act airport grant agreement. The majority found and applied a federal rule which (a) expands the immunity of a Georgia county beyond what the state's own rule requires; (b) discourages, rather than promotes, a federal policy of air transport safety; and (c) does not tend to create uniformity of result throughout the federal system. Petitioners contend first that state law should apply and secondly that federal common law is identical to state law in granting plaintiffs' standing to sue, and is not restrictive as found by the majority.

1. The Majority Opinion of the En Banc Court of Appeals Creates and Improperly Applies a Federal Common Law Rule in Conflict With Applicable State Law, and Expands a County's Governmental Immunity Beyond What the State's Own Rule Requires.

It seems clear that under Georgia law, as set forth by Judge Morgan in the panel opinion at 526 F(2) 685-686 (Appendix, pp. A-22-A-26), petitioners could sue, as intended third-party beneficiaries, for breach of the contract here in question. Georgia has created this contract exception to its own state-created rule of county immunity, and has thus said that while a county may not be sued in tort it can be sued for breach of contract, including such suit by intended third-party beneficiaries. County immunity is a state-created doctrine, and we believe it unnecessary to belabor here that it is a doctrine which the United States has no particular federal interest in encouraging. In fact the judicial and legislative trend throughout the country is strongly toward abolition of all sorts of governmental immunities. The United States, the County's partner in the Grant Agreement

and in the operation of the airport, is a co-defendant here under the Federal Tort Claims Act, having thus waived its sovereign immunity.

If this case had been brought in a Georgia state court, and Georgia law properly applied,[2] plaintiffs would be held to have stated a claim as third-party beneficiaries against the County, not barred by immunity. Instead, the action was brought in federal district court in Georgia, as a diversity action. By denying application of Georgia's contract exception to its general immunity doctrine, as its own courts would do, and by applying a more restrictive "federal common law" third-party beneficiary test, the federal court achieves here the result of granting to the Georgia county a contract immunity which its own courts have not granted. There is no federal common law immunity for a county—that doctrine, with whatever features and exceptions which may have been encrusted upon it or carved out from it, is purely a matter of state law. The Court of Appeals here recognized and applied the state's *general* doctrine of immunity, notwithstanding any federal policy; and at the same time *refused* to apply the state's own *exception* to its immunity doctrine, by asserting a federal policy which disallows the third-party beneficiary liberality which is the gist of the state's exception. Only by selecting pieces of the immunity doctrine and pieces of federal common law has the Court achieved its result. An across-the-board application of state law would have permitted the plaintiffs' claim under the contract exception to the immunity rule; and conversely federal law itself contains no immunity rule for counties (*Lincoln County v. Lunning*, 133 U.S. 529 [1890]—a county can be sued in federal court, and is not entitled, as is a State, to Eleventh Amendment immunity.) Furtheremore, the Court's result, while purporting to encourage uniformity of federal contract construction by application of federal law, in fact creates a lack of uniformity: many states do

[2] *Hancock County v. Williams*, 230 Ga. 723, 198 SE(2) 659 (1973).

not provide for county immunity at all, and most federal airport grant agreements are with municipal corporations, which are not immune. Thus the Court's decision, in the name of applying federal common law for the sake of uniformity, literally creates a situation where the state entity operating some few federally-funded airports is completely immune from liability, while most other such entities (municipalities, municipal authorities, and counties where there is no state law immunity doctrine) are in no way immune. We submit that it is apparent that both the federal policy of encouarging air transportation safety and the federal policy of achieving uniformity of law in this federally regulated area would be better served by a result which would eliminate immunity for entities operating federally-funded airports.

We must note one further aspect of the en banc majority's per curiam opinion. In its sole paragraph, it cites as supportive, in "reasoning" the very recent opinion of Chief Justice Burger in *United States v. Orleans*, . . . U.S. . . . (June 1, 1976). The Court below apparently finds *Orleans* supportive of the result of denying a civil remedy to persons injured or killed in connection with federally-funded projects. The Supreme Court there held that community agency employees were not federal employees, for purpose of federal Tort Claims Act liability. The Court below here has completely misapplied *Orleans*, which was a suit against the *United States* seeking that it be held responsible for the acts of persons who were not in fact its employees. *Orleans* must not be allowed to become authority for dismissing claims made directly against the non-federal agency to which federal funds flowed, as the en banc majority seems to have taken it for here.

2. **The Majority Opinion of the En Banc Court of Appeals —Over the Dissent of Five Members of the Court—Conflicts With Prior Decisions of This Court, in Holding That Federal Law Governs Interpretation of a Contract to Which the United States Is a Party, When the Suit Is Between Private Parties.**

The panel dissent of Judge Dyer adopted by the en banc majority holds (526 F2 686) (Appendix, p. A-27) that necessity for uniformity of decision requires that federal common law control the contract's interpretation. *United States v. Seckinger*, 397 US 203, reh den 397 US 1031 (1970), cited by the opinion as its principal authority, is quite different, in that there the plaintiff *was* the United States, seeking rights of indemnification under a standard clause of a contract to which it had been party. Similarly, *Clearfield Trust Co. v. United States*, 318 US 363 (1943), also relied upon by Judge Dyer, deals with the requirement of certainty as to the rights and duties of the United States itself on commercial paper which it issues.

The cases from this Court which are more closely on point do not impose a federal common law rule. *Bank of America Nat. T. &. Asso. v. Parnell*, 352 US 29 (1956), was a case involving the question whether federal or state law controlled in litigation concerning Government bonds and commercial paper. The suit was between private litigants in Federal District Court. The opinion held that state law governed the questions of burden of proof and of good faith, but that federal law governed the question of whether the bonds were overdue. That opinion is a limitation on a broad rating of *Clearfield*. The Court in *Bank of America* notes that transactions in government securities "also radiate interests in transactions between private parties. The present litigation is purely between private parties and does not touch the rights and duties of the United States. The only possible interest of the United States in a situation like the one here . . . is far too speculative, far too

remote a possibility to justify the application of federal law to transactions essentially of local concern." (352 US at 33-34)

In *Wallis v. Pan American Petroleum Corp.*, 384 US 63 (1966), the Court considered a diversity case between private parties with respect to assignment of a mineral lease on United States land. There was a conflict between Louisiana law, which required such transfers to be in writing, and federal law, which had no such requirement. The Fifth Circuit held that the Mineral Leasing Act of 1920 imposed a pervasive federal regulatory scheme, and that Louisiana law should not be applied.

This Court reversed, holding that application of state law would not involve a significant threat to any federal policy or interest. The Court held: "We find nothing in the Mineral Leasing Act of 1920 expressing policies inconsistent with state law in the area that concerns us here." (384 US at 69)

The recent case of *United States v. Little Lake Misere L. Co.*, 412 US 580 (1973), in an opinion by Chief Justice Burger, draws the distinction the cited cases recognize. The Court there held a federal rule to be applicable because the state rule with respect to acquisition of real property was "plainly hostile" to the interests of the United States, and because the United States was itself plaintiff in the action, asserting its rights. Further, the Court considered a third factor which we must acknowledge is present in our case, namely that the issue is "one arising from and bearing heavily upon a federal regulatory program." (412 US at 592).

We find no case from this Court suggesting that contract rights of private parties arising out of federal contracts ought to be governed by a federal common law rule, particularly, as developed in other sections of this Petition, when the state rule would suport the goals of a federal regulatory program (here, air safety) and application of the supposed federal rule would thwart such goals; and when the federal rule would promote

non-uniformity, by leaving standing to sue to the vagaries of state law as to county immunity from suit in *tort*. We respectfully submit that there is a need for this Court to clarify whether federal common law should apply to govern the rights of private litigants arising out of a contract to which the United States is a party, and involving important federal regulatory interests. We submit that the proper test should be whether the rights and duties of the *United States* will be subject to uncertainty if varying state law is applied. *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1973). While the federal government was a party to the contract here, and is a defendant here, under Federal Tort Claims Act claims, it has no particular interest in the outcome of the third-party beneficiary question in this diversity action, except the policy interests noted, which would be served by application here of state law. *Bank of America National Trust & Savings Assoc. v. Parnell*, 352 U.S. 29 (1956); *Wallis v. Pan American Petroleum Corporation*, 384 U.S. 73 (1966). *Nader v. Allegheny Airlines*, — U.S. — (June 7, 1976), is also authority that the federal statutory and regulatory scheme on civil aviation must not be taken to abridge common law remedies, such as petitioners here seek to enforce.

3. **The Majority Opinion of the En Banc Court of Appeals —Over the Dissent of Five Judges—Is in Conflict With Other Decisions From the Same and Other Circuits With Respect to What Is the Federal Common Law Rule on the Standing of Third-Party Beneficiaries to Sue on Contracts.**

The en banc majority, per curiam, adopts the dissent of Judge Dyer from the panel opinion, where Judge Dyer had stated at 526 F(2) at 686 (Appendix, p. A-27), that federal common law is identical to Restatement [First] of Contracts §145 (1932), which requires that the contract not only must reflect an intent to benefit the third party, but also must specifically

manifest an intent that he be compensated. This view, which becomes by adoption the express holding of the en banc majority, is clearly wrong as an expression of the federal rule. As noted by Judge Morgan in the en banc dissent at p. 5246 (Appendix, p. A-10), "the Restatement, now forty-four years old, antedates most of the major development of the third party beneficiary doctrine [and the] seven cases cited are inapplicable to the present case."

These seven cases relied upon by Judge Dyer in his panel dissent (now the opinion of the en banc majority), are cited in his panel opinion in a paragraph starting at 526 F(2) 679 (Appendix, pp. A-27-A-31). None of the cases are from our Circuit or from the Supreme Court. Moreover, we respectfully submit that they do not support the result. Although reluctant to expand the bulk of this Petition, we are obliged to discuss these seven cases in some detail, because reliance on them is the real meat of the opinion of the Court below, and we would not be willing to assert in a more summary fashion that Judge Dyer has misapplied them. Therefore petitioners' detailed critique of these cases, which Judge Dyer and the en banc majority below erroneously construed to create an improper federal common law rule, apepars in a long footnote hereto.[3] We submit that the en banc majority clearly

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[3] *West v. Morrison-Knudsen Company*, 451 F.2d 493 (9th Cir. 1971). This is *not* an application of "federal common law" but is a diversity jurisdiction opinion under the restrictive law of the State of Montana. The case holds that an injured employee of a subcontractor is not entitled to sue as a third-party beneficiary of a safety provision in the prime contract between the United States and the general contractor. The Court expressly states at the top of page 494 that it so rules *"because under the law of Montana* such a beneficiary of safety clauses in a contract could not recover in the absence of a specific promise in the contract to pay damages." (Emphasis added.)

Then at page 497 the Court says:

"Appellants argue, however, that the contract provisions operate to change the basic rules of tort so that a duty by contract

misapplied precedents from other circuits, and has created a clear conflict with the law of other circuits.

The seven cases cited by Judge Dyer as supportive of the use of a "federal common law rule," and specifically a restric-

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has been created, the breach of which creates a liability in tort for personal injury. They support their argument by the citation of cases from other jurisdictions which so hold. . . . *The problem here is not the weight of authority wherever it may lie, but the law of the State of Montana.*" (Emphasis added.)

Hensley v. United States, 279 F. Supp. 548 (D. Mont. 1968), is the next cited case by the dissent. Here the United States had a contract with a construction company for building a dam. An employee of that corporation was injured when an inadequate rope broke. The contract between the company and the United States stated that the contractor shall be fully responsible for safety of the employees. The plaintiff, the injured employee, it should be noted, was covered by the Montana Workmen's Compensation Act, and was being compensated under that statute. The plaintiff sought further compensation as third-party beneficiary of the contract between the United States and his employer.

The District Court focused solely upon the *Montana* third-party beneficiary statute, Section 13-204, RCM, 1947, which reads as follows: "A third-party may enforce a contract made expressly for his benefit." The Court notes that the Montana Supreme Court has ruled that the statute means the expression must be "in direct terms." Likewise, the Court notes that the Ninth Circuit in *National Surety Co. of New York v. Ulmen,* 68 F.2d 330 (9th Cir. 1933, cert. den'd 292 U.S. 624) "after an extensive review of the Montana authority concluded that a contract of the kind involved here is not enforceable by a third-party." If the case does stand for a rule that a contract must not only evidence an intent directly to benefit the third-party plaintiff but must also specifically evidence an intent to compensate him, then it is perfectly clear that the Court is following *Montana* law, not federal law or general law.

Judge Dyer next cites *Brotherton v. Merritt-Chapman & Scott Corp.,* 213 F.2d 477 (2d Cir. 1954). This was an opinion by Judge Frank which says simply that this was a clear case where certain described contract language does not create third-party beneficiary status for the plaintiff. As to whether a federal rule is deemed to exist, the case appears to suggest to the contrary, because of the six cases cited by Judge Frank three of them are state court cases, although the question the case presents was a contract between the United States and a construction firm. We do not read the case to

tive rule along the lines of Restatement [First] of Contracts §145, treated in detail in the footnote, can be summed up as follows: One, *Housing Corporation of America,* is a case of a third-party beneficiary suing the United States in an area where it had not waived sovereign immunity. Two (*Sayre* and

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be any support for the proposition that a federal rule should prevail to determine who is a third-party beneficiary, but rather as simply a finding that the particular contract provision in question was, as Judge Frank states at the beginning of the opinion, "intended solely for the government's benefit and not for the benefit of other contractors as third-party beneficiaries. We think this is so clear that we can content ourselves with a mere citation of leading cases." (213 F.2 at 478)

Next, Judge Dyer cites *Johnson v. Redevelopment Agency of the City of Oakland, California,* 317 F.2d 872 (9th Cir. 1963). The case holds that persons affected by an urban renewal development project involving contracts between the United States and a California agency may not sue the California agency as third-party beneficiaries of those contracts, to enjoin the project. The Court holds that the contract "is governed by federal law" and "the federal courts have consistently held that those not party to the contract have no standing to enforce conditions imposed on redevelopment agencies by the United States. . . ." (page 874). That the rule of that case is clearly limited to contracts concerning urban development is shown by the balance of the opinion, which goes on to explain that, in this area of legislation, three alternative remedies to such a third-party beneficiary lawsuit are provided, none of which these plaintiffs pursued. They are: (1) a grievance procedure before the federal housing administration; (2) federal and state requirements of public hearings, at which the plaintiffs did not appear; and (3) a California statutory provision for suit on the project in state court within 60 days of adoption. This also the plaintiffs failed to pursue. Thus the case does not announce any general federal disinclination towards third-party beneficiary suits on federal contracts, and it goes to some pains to show that the result of disallowing third-party beneficiary status to these plaintiffs here is not unfair, because of the several alternative remedies built into the statutory scheme. Subsequent cases have expressly refused to follow *Johnson.* In *Norwalk Core v. Norwalk Redevelopment Agency,* 395 F.(2) 920 (2nd Cir. 1968) the Court held that it would "decline to follow" *Johnson* (395 F.(2) at 935). The Fourth Circuit in *M. M. Crockin Co. v. Portsmouth Redevelopment & H. Auth.,* 437 F.(2) 784 (1971) also so held.

Judge Dyer next cites *Mahler v. United States,* 306 F.2d 713 (3d Cir. 1962). Here injured plaintiffs sued the United States be-

Johnson) are expressly limited to contracts with redevelopment agencies, at the suit of persons claiming to be injured by urban renewal projects. As discussed in the footnote, the Second Circuit has expressly declined to follow *Johnson*, as has the Fourth Circuit. In one (*Mahler*) the Court expressly looked both to state and federal law for a basis of liability. In another (*Brotherton*) the Court seems implicitly to look to

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cause a boulder on a federal highway fell on plaintiff's automobile. The Court expressly looked first at state law (at page 722) to see if there was any "Pennsylvania rule of law which would impose liability on a private person under similar circumstances." The Court found no such state rule. It then looked to whether there was any basis for liability under the Federal Tort Claims Act. There it noted the existence of an exception from United States liability if the action by the United States was made "at a planning rather than operational level. . . ." (page 723). The Court concludes that the United States' duties here were clearly "planning" rather than "operational" and affirmed judgment for the United States. The case really is of little relevance to our situation *vis a vis* County liability, but it should be noted that even here, where the question was the liability of the United States itself, the Court looked both to state law and to federal law to see if a basis for liability could be found under *either*.

Housing Corporation of America v. United States, 468 F2d 922 (U.S. Ct. Cl. 1972), next cited in the dissent, at p. 1581, we respectfully submit, is almost totally inapplicable—it is a question of a third-party beneficiary suing the United States in an area where the United States has not waived its sovereignty.

Finally, Judge Dyer in this series of citations relies upon *Sayre v. United States*, 282 F. Supp. 175 (N.D. Ohio 1967). This, like the *Johnson v. Redevelopment Agency* case cited by the dissent as supsupporting a restrictive federal rule of third-party beneficiary rights, is on its facts and by its express language an interpretation of an urban renewal venture between the United States and a local government. The case is brought by a property owner claiming to have been injured by the project, in that the use and value of his real property was damaged. The United States is dismissed as a defendant on its motion for summary judgment, under the "discretionary function" exception to the Federal Tort Claims Act, and certain limited claims against the City of Cleveland are allowed to proceed. Specifically upon the third-party beneficiary issue, the Court holds at page 190 that: "The federal courts have consistently held that those not parties to the contract have no standing to enforce conditions imposed on *redevelopment agencies*. . . ." (Emphasis added.)

both state and federal cases. In two (*West* and *Hensley*) the courts specifically stated that they were following a restrictive Montana state rule. Thus we respectfully suggest that the majority opinion is incorrect in stating that there is a body of federal cases which requires imposition of a restrictive federal common law rule to control questions of third-party beneficiary rights under contracts to which the United States is a party.

As noted by Judge Morgan's dissent at p. 5246 of the en banc opinion (Appendix, pp. A-10-A-13), there are at least two circuit court cases, including one from our circuit, supporting the view that federal common law on the third-party beneficiary issue is identical with Georgia law: *Bossier Parrish School Board v. Lemon*, 370 F(2) 847 (5th Cir. 1967); and *City of Inglewood v. City of Los Angeles*, 451 F(2) 948 (9th Cir. 1972).

In *Bossier* the Fifth Circuit held that black children who were not allowed to attend a county (Louisiana parish) school system could sue as third-party beneficiaries under a contract between the United States and the school system. As Judge Morgan notes, "Because *Bossier* was brought as a federal question suit, it is clear that the panel was applying federal common law when it held that the assurances given by the defendant in return for the United States grants made permissible a third-party beneficiary suit by plaintiffs." (En banc dissent, pp. 5246-47; Appendix, pp. A-10-A-13).

And in *City of Inglewood*, a federal question case involving an airport grant agreement, just as in our case, the Ninth Circuit held that the federal aviation acts *did* contemplate that the assurances required by the United States of the airport authority as part of the grant agreement *were* intended for the benefit of the local residents and the users of the airports, both with respect to flight safety and welfare of persons living nearby the airport. The Ninth Circuit *allowed* the third-party beneficiary action. Its opinion is absolutely in conflict with that of the en banc majority here.

The separate dissent of Chief Judge Brown from the en banc opinion, at pg. 5248 (Appendix p. A-14) concludes that it is obvious from the record in our case that the petitioners were intended beneficiaries of the grant agreement, and that as a matter of federal law, which he feels is controlling, they are entitled to sue for the "contractual dereliction" of the County.

Thus whether our case be seen as a federal question jurisdiction case, on the one hand; or as a diversity case where federal common law ought to control because important federal interests are involved; or as a diversity case where the federal court is due to apply state law—in any of these three situations, which embrace the full range of possibilities—the Miree plaintiffs were entitled to standing as third-party beneficiaries.

4. **The Majority Opinion of the En Banc Court of Appeals, as Noted by the Five Dissenting Judges, Expands Federal Question Jurisdiction.**

Judge Dyer's panel dissent at 526 F2 686 (Appendix, p. A-27) adopted by the en banc majority as its opinion, holds that "the necessity of uniformity of decision demands that federal common law, rather than state law, control the contract's interpretation." The en banc dissent, at p. 5245 (Appendix, p. A-9), notes that "through the majority's holding that federal common law controls the entire interpretation of any contract entered into by the United States, however, it is quite possible that federal jurisdiction has been expanded."

While noting that the Supreme Court has not decided the issue, the en banc dissenters note that the "better view" meanwhile is that a case arising under federal common law is a federal question case, and is within the original jurisdiction of the federal courts. (en banc dissent, pp. 5245-5246 (Appendix, pp. A-9-A-10), citing *C. Wright, Law of Federal Courts* 250 (2nd Ed. 1970). Thus, notes the dissent, under the majority's

holding there would appear to be federal question jurisdiction whenever third-parties claim the benefit of a contract involving the United States. This is an important question on which there is no authority in point from the Supreme Court.

5. **Uniformity of Decision and Implementation of the Federal Policy of Encouraging High Standards of Safety in Aviation Require Recognition of a Rule Which Will Permit the Aeronautical Users of Federally Funded and Regulated Airports a Remedy Against All State Governmental Units Which Operate Such Airports.**

This much-needed result can be accomplished in this case in any of several ways:

(a) By adopting Judge Morgan's opinion, which permits the use of a state-created third-party beneficiary remedy.

(b) By applying the federal common law rule of *Bossier, supra,* and *City of Inglewood, supra,* which permit such third-party actions as a matter of federal law. This would be an application of Chief Judge Brown's reasoning in his separate dissent. As a corollary, it might be noted that such a rule can be so drawn as to be limited to situations where there are strong federal policies to be enforced—such as equal school access, in *Bossier,* and aviation safety, as in *City of Inglewood* and the case at bar. This would eliminate the threat of greatly expanded federal-question jurisdiction.

(c) Thirdly, as we argued to the lower court, but not treated in its opinions, an implied civil remedy for violation of safety provisions under the aviation statutes of the United States could be recognzed by this Court; as has been done in *Rauch v. United Instruments, Inc.* (E.D. Pa.), 44 Law Week 2149, 44 Law Week 2289 (opinions of Sept. 11, 1975 and Dec. 17, 1975); in *Gabel v. Hughes Air Corp.*, 350 F. Supp. 612 (C.D. Calif. 1972); in *Town of East Haven v. Eastern Airlines, Inc.*, 282

F. Supp. 507 (1968); and *In Re Paris Air Crash*, 399 F. Supp. 732 (D.C. Calif. 1975). (Of these four cases, *Gabel* and *Paris Air Crash* involved death claims. *Town of East Haven* concerned jet noise, and *Rauch* does not involve personal injury.) A recent note in 51 N. Y. U. Law Rev. 231 (May, 1976) proposes that *Gabel* be followed and that a federal cause of action be recognized.

(d) Fourthly, as we also argued below, the Court could hold that the County here waived its immunity from suit when it entered the federal sphere of air commerce. *Parden v. Terminal R. of Alabama Docks Dept.*, 377 U.S. 184, reh. den. 377 U.S. 1010 (1964).

CONCLUSION

For the reasons stated, it is submitted that the Petition for Certiorari should be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit.

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Attorneys for Petitioners

Certificrte of Service

I hereby certify that three copies of the foregoing Petition for Certiorari have this date been served by mail upon all parties represented in this proceeding.

This 29th day of October, 1976.

Alan W. Heldman

APPENDIX

APPENDIX A

George Henson MIREE et al.,
Plaintiffs-Appellants,

v.

U.S.A.

Judith Anita PHILLIPS, widow of
David Emanuel Phillips, deceased,
Plaintiff-Appellant,

v.

UNITED STATES of America, Defendant-
Third-Party Plaintiff-Appellee.

DeKALB COUNTY, GEORGIA,
Defendant-Appellee,

v.

MACHINERY BUYERS CORP., et al.,
Third-Party Defendants-Appellees.

William Michael FIELDS,
Plaintiff-Appellant,

v.

UNITED STATES of America,
Defendant-Appellee,

DeKalb County, Georgia, et al.,
Defendants-Appellees.

FIREMAN'S FUND INSURANCE COMPANY,
Plaintiff-Appellant,

v.

UNITED STATES of America,
Defendant-Appellee,

DeKalb County, Georgia, et al.,
Defendants-Appellees.

Pearlie CHAISSON, Plaintiff-Appellee,

v.

SOUTHEAST MACHINERY, INC.,
Defendant and Third-Party
Plaintiff-Appellant,

v.

UNITED STATES of America, et al.,
Third-Party Defendants-Appellees.

Nos. 74-3670, 74-3822, 74-3864,
74-3870 and 74-3881.

United States Court of Appeals,
Fifth Circuit.

Aug. 25, 1976.

Appeals from the United States District Court Northern District of Georgia.

Before BROWN, Chief Judge, GEWIN, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, MORGAN, CLARK, RONEY, GEE, TJOFLAT and HILL, Circuit Judges.*

PER CURIAM:

The Court en banc adopts as its opinion Parts I, II, and IV of the majority panel opinion in this cause, 526 F.2d 679-686. The Court en banc adopts as its opinion the dissenting opinion of Judge Dyer, 526 F.2d 686-688 in lieu of Part III of the majority panel opinion. While not directly in point, the Court has reviewed the case of *United States v. Orleans*, — U.S. —, 96

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* Because of illness Judge Wisdom did not participate in the hearing or the consideration of this case. Judge Thornberry was a member of the En Banc court that heard oral arguments but due to illness did not participate in this decision.

S.Ct. 1971, 48 L.Ed.2d 390. The reasoning of the dissenting opinion, adopted here, is remarkably consistent with the policy considerations noted by the Chief Justice in *Orleans*.

Accordingly, the judgment of the district court is

AFFIRMED.

TJOFLAT, Circuit Judge (concurring).

I agree that, in general, government contracts, and especially those having to do with the airways, should be controlled by federal law. *See generally Illinois v. Milwaukee*, 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972); *United States v. Seckinger*, 397 U.S. 203, 90 S.Ct. 880, 25 L.Ed.2d 224 (1970); *Northwest Airlines v. Minnesota*, 322 U.S. 292, 64 S.Ct. 950, 88 L.Ed. 1283 (1944); *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), *cert. denied sub nom., Forth Corp., v. Allegheny Airlines, Inc.*, 421 U.S. 978, 95 S.Ct. 1979, 44 L.Ed.2d 470 (1975). *See also* Federal Aviation Act of 1958, § 1108(a), 49 U.S.C. § 1508(a) (1970). I also agree that the public was not an intended third-party beneficiary of the contract assurances mandated by 49 U.S.C. § 1110, *now enacted at* 49 U.S.C. § 1718 (1970). Consequently, I concur.

LEWIS R. MORGAN, Circuit Judge, with whom JOHN R. BROWN, Chief Judge, and GOLDBERG, AINSWORTH and GODBOLD, Circuit Judges, join (dissenting):

The court *en banc* adopts as its decision Parts I, II, and IV of the majority panel opinion, which held that under Georgia law plaintiffs could not recover against defendant DeKalb County under a theory of negligence,[1] of nuisance, or of waiver of immunity through the County's purchase of liability insurance.

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[1] While plaintiffs presented abundant evidence to make out a prima facie case of negligence against defendant in the operation of the DeKalb-Peachtree Airport, an analysis of applicable Georgia case law indicated that DeKalb County was immune from suit under a theory of negligence.

The majority *en banc* also adopts Judge Dyer's dissent in the original panel opinion in lieu of Part III of that same opinion. In Part III, the majority panel opinion held that under Georgia law plaintiffs could sue as third party beneficiaries to a contract between the Federal Aviation Administration (FAA) and DeKalb County. Through its adoption of Judge Dyer's dissent, however, the majority *en banc* holds that suit as third party beneficiaries is likewise unavailable to plaintiffs and that, accordingly, their entire action was properly dismissed.

DeKalb County entered into an agreement with the FAA whereby in return for a grant of money by that agency, it gave the FAA certain assurances, among which were its promises that it would operate the airport for the use and benefit of the public, maintain it in a safe and serviceable condition, and limit use of adjacent land so that it would not interfere with the safe use of the airport. *Miree v. United States*, 5 Cir., 526 F.2d 679 at 686, n.12. The majority panel opinion held that under Georgia law plaintiffs could sue as third party beneficiaries for the County's alleged breach of its contractual duties.[2] Judge Dyer's dissent, which the court *en banc* now adopts, argued that federal common law, not Georgia law, should control the interpretation of third party beneficiary rights under a contract entered into by the United States Government and other parties. We respectfully dissent.

I. Inapplicability of Federal Common Law.

After *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), in which the Supreme Court held that in

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[2] Specifically, through the County's continued operation of the county garbage dump, which lay adjacent to the airport, large numbers of birds swarmed over the airport and created allegedly hazardous conditions. It was the ingestion of a large number of these birds into the air intake system of the airplane's engine that allegedly caused the crash in question.

diversity cases[3] state law generally shall apply, it became clear that federal general common law no longer existed. Yet, with the much publicized *Clearfield Trust Co. v. United States*,[4] 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1973), it became clear that federal common law, as opposed to federal *general* common law, still lived. In *Clearfield*, a check drawn on the United States Treasurer payable to a named government employee was stolen and forged and the Clearfield Trust Company paid the check over the forged endorsement. In determining that federal common law, not state law, applied, the Supreme Court held that rights and duties of the United States on commercial paper that it issues should not be controlled by local law. That is, "the issuance of commercial paper by the United States is on a vast scale and transactions in that paper . . . will commonly occur in several states. The application of state law . . . would subject the rights and duties of the United States to exceptional uncertainty. . . . The desirability of a uniform rule is plain." *Id.* at 367, 63 S.Ct. at 575. Hence, the rationale supporting the *Clearfield* decision is that when the rights and duties of the United States are to be determined, uniformity of result is desirable. *Accord, United States v. Standard Oil*, 332 U.S. 301, 67 S.Ct. 1604, 91 L.Ed. 2067 (1947) (indemnification of Government for injury to its soldier is matter of federal fiscal policy that demands uniform result).

It seems quite clear to us then that absent explicit Congressional command, federal common law should be chosen in a

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[3] Justice Brandeis' exact words were: "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state . . . There is no federal general common law." 304 U.S. at 78, 58 S.Ct. at 822.

[4] Actually, on the same day that *Erie* was announced, Justice Brandeis held that "whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110, 58 S.Ct. 803, 811, 82 L.Ed. 1202 (1938).

diversity case only when there exists an identifiable federal interest in the outcome of the particular case or in a consistent result in cases of its class. Such an interest is not involved in this case. Here, we have litigation between two non-federal parties over the rights of one as a third party beneficiary to a contract executed by the other. While the federal government was a party to this contract, it has no particular interest in the outcome of the third party beneficiary question in this diversity suit.[5] Such a question is a matter to be decided by the particular state's own contract law. Indeed, whether or not the plaintiffs could recover as third party beneficiaries is of no significance to the United States in that it affects no rights or liabilities of the United States[6] and involves no impact on a federal fiscal policy.[7]

We find our approach supported by analogous Supreme Court cases. In *Bank of American National Trust & Savings Association v. Parnell*, 352 U.S. 29, 77 S.Ct. 119, 1 L.Ed.2d 93 (1956), a diversity case in which the United States was not a party, the Supreme Court held that in litigation between two private parties over negotiation of federal bonds, state law controlled. The words of Justice Frankfurter are particularly appropriate for the present case:

> The present litigation is purely between private parties and does not touch the rights and duties of the United States. The only possible interest of the United States in a situation like the one here . . . is that the floating of securities of

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[5] To the extent that the United States would have any interest in the outcome, its interest would favor recovery by the plaintiffs, in that the United States required the County to promise to maintain safe conditions at the airport. Unless the United States intended this to be an empty promise by the County, one would assume that it would favor a result encouraging the keeping of this promise. See Section II, infra.

[6] *Clearfield Trust Co. v. United States, supra.*

[7] *United States v. Standard Oil, supra.*

> the United States might somehow or other be adversely affected by the local rule of a particular State regarding the liability of the converter. *This is far too speculative, far too remote a possibility to justify the application of a federal law to transactions essentially of local concern.*

Id. at 33-34, 77 S.Ct. at 121. (Emphasis added.) Likewise, in *Wallis v. Pan American Petroleum Corporation*, 384 U.S. 63, 86 S.Ct. 1301, 16 L.Ed.2d 369 (1966), the Supreme Court held that state law applies to a case between two private parties involving the assignment of an oil and gas lease given by the United States through the Mineral Leasing Act for Acquired Lands. In rejecting the application of federal common law, the Court stated:

> In deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown. It is by no means enough that, as we may assume, Congress could under the Constitution readily enact a complete code of law governing transactions in federal mineral leases among private parties. Whether latent federal power should be exercised to displace state law is primarily a decision for Congress. Even where there is related federal legislation in an area, as is true in this instance, it must be remembered that 'Congress acts . . . against the background of the total corpus juris of the states . . .' Hart & Wechsler, The Federal Courts and the Federal System 435 (1953). Because we find no significant threat to any identifiable federal policy or interest, we do not press on to consider other questions relevant to invoking federal common law, such as the strength of the state interest in having its own rules govern . . .
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> * * * * * * *
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> Finally, *it is said that because the leases are issued by the United States and concern federal lands, there is a federal*

> *interest in having private disputes over them justly resolved. Apart from the highly abstract nature of this interest, there has been no showing that state law is not adequate to achieve it.*

Id. at 68-71, 86 S.Ct. at 1304, 16 L.Ed.2d at 373-74 (emphasis added). We find the present case to be analogous to both *Parnell* and *Wallis*. Like *Parnell* and *Wallis*, this case involves litigation between private parties over a matter in which the federal government has been somewhat involved, but in which no issue of the rights and liability of the government is being litigated and in which no federal interest demanding a uniform disposition is involved.[8]

In addition to these Supreme Court precedents, we feel that there are several policy considerations that favor application of state law over federal common law in this case. First, there is the important consideration of comity between the state and federal governments deemed so important in *Erie*. As the Supreme Court has stated: "As respects the creation by the federal courts of common-law rights, it is perhaps needless to state that we are not in the free-wheeling days antedating *Erie R. R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188. *The instances where we have created federal common law are few and restricted.*" *Wheeldin v. Wheeler*, 373 U.S. 647, 651, 83 S.Ct. 1441, 1445, 10 L.Ed.2d 605, 611 (1963) (emphasis added) (citation omitted). Here there exists a ready-made body of Georgia law on contract law, a subject well-disposed to adjudication through state law.[9]

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[8] Indeed, the three cases cited by Judge Dyer for the proposition that federal common law should apply involved situations in which the United States was either seeking indemnity or was itself suing for damages on a contract made between it and another party. *See Miree v. United States, supra*, at 686. Hence, in these cases the United States did have an identifiable interest in the outcome of the case that demanded an application of federal common law.

[9] We note that in several instances, the Supreme Court has applied state law in a suit brought in federal court for the reason that the matter is one of particular state concern and one on which the state has already developed a large body of law. For example, in *United States v. Yazell*, 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966), a suit brought by the United States to obtain payment of a loan made by the Small Business Administration, the Supreme Court applied state law on the issue of the female defendant's disability to contract, noting that the state had developed a body of law on the issue in question and that, absent an overriding federal interest, the state's interest in the matter should be respected. *Id.* at 352, 86 S.Ct. at 507, 15 L.Ed.2d at 410. Although the jurisdictional basis for it was the existence of a federal question, *DeSylva v. Ballentine*, 351 U.S. 570, 580-81, 76 S.Ct. 974, 979-80, 100 L.Ed. 1415, 1427-28 (1956), is in accord (state law, not federal law, determines the meaning of "children" under § 24 of the Copyright Act of 1947). We feel that the interest of the state in applying its own law governing third party beneficiary rights is equally compelling.

Second, we find the result in this case cruelly ironic in that through the application of federal common law, the majority preserves the County's immunity from suit by imposing a stricter test for third-party beneficiary standing than Georgia's own courts do. In view of the fact that the United States has enacted a complex scheme of federal aviation laws whose purpose is to promote air safety and that the Government in its contract with DeKalb County demanded assurances that the latter would maintain the airport in a safe condition, we cannot understand what federal purpose can possibly be served by conferring on DeKalb County greater immunity than its own state laws give it.

Finally, there is one other possible ramification of the case that could prove to be an unpleasant surprise for my brothers who join in the majority opinion: the expansion of federal jurisdiction. There was some concern that our holding in the original panel opinion expanded federal jurisdiction, that, carried to its logical conclusion, it would result in making a "federal case" out of a minor slip and fall accident at a county airport. The basis of that fear always seemed unclear, in that the present case is a diversity case, not a "federal question" case in which a particular holding could well expand federal jurisdiction.[10] There-

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[10] *E. .g., Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

fore, whether we had held that Georgia law did or did not render the County liable on a third party beneficiary theory, the case was nevertheless a diversity case whose particular holding could not possibly expand or contract federal jurisdiction. Through the majority's holding that federal common law controls the entire interpretation of any contract entered into by the United States, however, it is quite possible that federal jurisdiction has been expanded. This is, "though the matter remains undecided by the Supreme Court, the better view is that a case 'arising under' federal common law is a federal question case, and is within the original jurisdiction of the federal courts as such." *C. Wright, Law of Federal Courts* 250 (2d ed. 1970). Accordingly, it would seem that with this court's *en banc* decision there is now federal question jurisdiction over any claim made as a third party beneficiary to a contract involving the United States—a result that gives a much broader jurisdictional base than the present diversity basis alone.

For the above reasons, we believe the original panel opinion applying Georgia law to the question should be affirmed.

II. Third Party Beneficiary Suits Under Federal Common Law.

While we do not believe that federal common law should apply in this case, we also dissent from the majority's holding that such federal law would preclude plaintiffs' suits as third party beneficiaries. Judge Dyer cites the *Restatement (First) of Contracts*, § 145 (1932) and seven cases—none of which derives from either the Supreme Court or this circuit—for the proposition that members of the public can recover damages under a contract with the United States to which they are not a party only when the contract manifests an intention that they be so compensated. *Miree v. United States, supra,* at 686-87. We contend that this authority is not persuasive in that the Restatement, now forty-four years old, antedates most of the major development of the third party beneficiary doctrine and that the seven cases

cited are inapplicable to the present case.[11] Two cases out of the Fifth and Ninth Circuits that are much closer to the present case support our argument that federal common law should favor plaintiffs' recovery. In *Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5th Cir. 1967), this court held that black children who were not allowed to attend the Bossier, Louisiana public schools could sue as third party beneficiaries under a contract between the United States and the Bossier Parish school system. Specifically, the United States Department of Health, Education, and Welfare had administered grants of two million dollars to the Bossier Parish school system, for which the school system gave various promises in return, among them the assurance that children of parents stationed at Barksdale Air Force Base could attend the public schools; the black children discriminated against in *Bossier* were children of such parents. Because *Bossier* was brought as a federal question suit, it is clear that the panel was applying federal common law when it held that the assurances given by the defendant in return for the United States grants made permissible a third party beneficiary suit by plaintiffs.

In a case even closer factually to the present case, the Ninth Circuit held that plaintiff, an adjacent city to the defendant air-

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[11] None of these cases seem particularly applicable to the facts of this case. In two of the cases—*West v. Morrison-Knudson Company*, 451 F.2d 493 (9th Cir. 1971) and *Hensley v. United States*, 279 F.Supp. 548 (D.Mont.1968)—the courts were utilizing *Montana* third-party beneficiary law. *Brotherton v. Merritt-Chapman and Scott Corp.*, 213 F.2d 477 (2d Cir. 1954), does not clearly state whether it is applying federal or state law, but, in any event, that case involved an incidental beneficiary. *Mahler v. United States*, 306 F.2d 713 (3rd Cir. 1962), was a tort case, not a third party beneficiary action. Two cases that disallowed third party suits—*Johnson v. Redevelopment Agency*, 317 F.2d 872 (9th Cir. 1963) and *Sayre v. United States*, 282 F.Supp. 175 (N.D. Ohio 1967)—were limited to the facts of their case, facts which included a comprehensive federal statutory scheme on redevelopment that precluded such suits. Finally, *Housing Corp. of America v. United States*, 468 F.2d 922, 199 Ct.Cl. 705 (U.S. Ct.Cl.1972), denied a third party beneficiary action because the United States had fulfilled its duty under the contract and because a section of the contract explicitly prohibited third party beneficiary actions.

port, had standing to sue as a third party beneficiary to grant agreements made between an airport and the FAA. *City of Inglewood v. City of LosAngeles*, 451 F.2d 948 (9th Cir. 1972). In that case, plaintiff, who alleged federal question grounds, sued for damages and injunctive relief arising from noise that resulted from operation of the Los Angeles International Airport. Reversing the district court in its holding that plaintiff could not sue as a third party beneficiary in that it was not an intended beneficiary of the grant agreement, the Ninth Circuit examined the legislative history of 49 U.S.C.A. § 1110(4) [now 49 U.S.C.A. § 1718(4)],[12] pursuant to which the grant agreement was executed, and found that flight safety was not the sole purpose of the section, but that the welfare of persons living close to airports was also to receive protection. The court stated:

> If Los Angeles made the assurances required . . . in applying for various grant agreements, then Inglewood must certainly be included within the category of intended beneficiaries of those assurances. *Congress had some purpose in enacting these two sections of Title 49. It is not to Los Angeles' benefit to be required to give the Secretary those assurances; nor are the assurances of any independent benefit to the Secretary.* The Secretary merely receives them for the benefit of, and in the place of, the surrounding communities and residents of the area.

Id. at 956 (emphasis added). Of course, the facts in the present case do involve flight safety, as opposed to noise disturbance, but the Ninth Circuit's discussion in Inglewood makes it quite

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[12] That section reads:

> As a condition precedent to his approval of an airport development project under this subchapter, the Secretary shall receive assurances in writing, satisfactory to him, that—
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> (4) appropriate action . . . has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and take-off of aircraft.

clear that such safety was the primary object sought by the grant assurances. Just as in *Inglewood*, in this case, it was not for the benefit of DeKalb County nor for the benefit of the FAA that the government required the County to promise that it would maintain the airport in safe operating condition. Obviously, the only parties that the assurance could possibly have benefited were those members of the flying public who used DeKalb-Peachtree Airport. Accordingly, we contend that under federal common law plaintiffs were the intended beneficiaries of the grant agreement and should have been allowed to so sue.

III. Conclusion.

In summary, we feel that regardless of which law should be applied in this case, the result reached here is clearly incorrect. We have in this case plaintiffs suing a fully insured County against whom a strong prima facie case of negligence and breach of contract have been made. Under our interpretation of Georgia law, the law which we believe to be applicable here, plaintiffs could sue as third party beneficiaries to the grant agreement between the United States and DeKalb County.[13] We feel that the same result should obtain under application of federal common law. Yet, the majority applies a federal common law narrower in its allowance of recovery than Georgia law, the forum that should have the greater interest in determining whether its county should be immune from suit. In the face of a contract provision enacted at the insistance of the United States that requires DeKalb County to maintain a safe airport and of an extensive scheme of federal aviation laws whose purpose is to encourage safe airport operations, we cannot understand what federal interest is served by overruling Georgia law to defeat an action by these plaintiffs. We respectfully dissent.

JOHN R. BROWN, Chief Judge (dissenting):

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[13] *Hancock County v. Williams*, 230 Ga. 723,198 S.E.2d 659 (1973).

I join in Judge Morgan's fine dissent. I have reservations about part I but these are not decisive of this case.

I emphasize that I believe federal, not state, law controls. This is an area in which there is a need for that consistency which can only be provided by uniform national standards—a consistency, in short, which requires the application of federal construction of federal contracts. Like Judge Morgan, however, I believe that federal law not only does not preclude the plaintiffs below from recovering as third party beneficiaries but that federal law compels this result.

To assert that Congress, in enacting 49 U.S.C.A. § 1718(4), meant for contracts between the FAA and airports to benefit that countless multitude of taxpayers and land-locked citizens and to exclude those of the flying public—including peripatetic Judges whose airborne safety is central to them—is to say Congress was incongruous. Who else but the flying public—with or without life tenure (which after all lasts for this life only)—were they thinking of? The proof of the pudding, as this record indicates, is that the Federal Government, disturbed about the presence of garbage fed fowls, sought and obtained from the District Court an injunction against the continuance of this menace. In what name was this remedy invoked—in the name of the safety of the air traveling public. If the Government could, should, and did protect them from this hazard to their very temporal existence, how in the name of legalese can we conclude that the contract did not mean that fliers—or unfortunately, their successors, assigns, widows and orphans—while protected in a general sense, were not to be entitled to the only redress an aggrieved survivor has for such a contractual dereliction?

APPENDIX B

George Henson Miree et al.,
Plaintiffs-Appellants,

v.

United States of America et al.,
Defendants-Appellees.

Judith Anita Phillips, Widow of David Emanuel Phillips, Deceased,
Plaintiff-Appellant,

v.

United States of America,
Defendant-Third-Party Plaintiff-Appellee.

DeKalb County, Georgia,
Defendant-Appellee,

v.

Machinery Buyers Corp. et al.,
Third-Party Defendants.

William Michael Fields,
Plaintiff-Appellant,

v.

United States of America,
Defendant-Appellee,
DeKalb County, Georgia, et al.,
Defendants-Appellees.

Fireman's Fund Insurance Company,
Plaintiff-Appellant,

v.

United States of America,
Defendant-Appellee,
DeKalb County, Georgia, et al.,
Defendants-Appellees.

Pearlie Chaisson,
Plaintiff-Appellee,

v.

Southeast Machinery, Inc.,
Defendant and Third-Party Plaintiff-Appellant,

v.

United States of America et al.,
Third-Party Defendants-Appellees.

Nos. 74-3670, 74-3822, 74-3864, 74-3870, 74-3881.

United States Court of Appeals,
Fifth Circuit.

Jan. 30, 1976.

Appeal from the United States District Court for the Northern District of Georgia.

Bebore GODBOLD, DYER and MORGAN, Circuit Judges.

LEWIS R. MORGAN, Circuit Judge:

On February 26, 1973, a Lear Jet crashed shortly after take-off from the DeKalb-Peachtree Airport. The alleged cause of the crash was the ingestion of a large number of birds swarming over the airport and adjacent county garbage dump. Damage was substantial; all passengers were killed, the plane was destroyed, an individual on the ground was severely injured by burning jet fuel that fell from the disabled plane shortly before crashing, and property at the crash site was extensively damaged. Separate actions were brought by the passengers' survivors,[1] the burn victim,[2] the owner of the plane,[3] and the owner of the property at the crash site.[4] The various plaintiffs, suing in diversity, asserted theories of negligence, nuisance, and breach of contract. Defendant DeKalb County moved to dismiss on grounds that it was immune from suit under Georgia Law. Defendant's motion was granted, and the plaintiffs appealed.

I

[1] The plaintiffs present a prima facie case of negligence that would certainly survive a motion to dismiss in the absence of any immunity question. The essence of their claim is that large numbers of birds had flocked around the garbage dump adjacent to the airport for a considerable period of time, that the county was aware of the bird problem prior to the crash, and that birds had interfered with planes on prior occasions. All this, of course, is to no avail if counties are immune from being sued in negligence. Relying heavily on three cases, the plaintiffs contend that counties are not immune from negligence suits. First, they argue that the Uniform Airports Law (UAL)[5] was held to constitute a statutory waiver of *municipal* immunity in *Caroway v. City of Atlanta*, 85 Ga.App. 792, 70 S.E.2d 126 (1952), a case involving airport negligence. Next, they cite *Southern Airways v. DeKalb County*, 102 Ga.App. 850, 118 S.E.2d 234

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[1] In No. 74-3670, George Henson Miree, Claude Estes Miree, and Dorothy Estes Miree sue as survivors to their parents, Mr. and Mrs. Richardson F. Miree. In No. 74-3822, Judith Anita Phillips sues as survivor to her husband, David E. Phillips.

[2] No. 74-3864, *William Michael Fields v. DeKalb County, Georgia.*

[3] In No. 74-3870, Fireman's Fund Insurance Co. sues as assignee to Southeast Machinery's claim for destruction of the Lear Jet.

[4] No. 74-3881, *Pearlie Chaisson v. Southeast Machinery, Inc.*

[5] Ga. Code Ann. § 11-201, *et seq.*

(1960), for the proposition that suits may be maintained against counties for breach of contract under the UAL, because operation of an airport is a proprietary function. Finally, they tie up the argument with a quotation from *Taylor v. King*, 104 Ga. App. 589, 122 S.E.2d 265 (1961), to the effect that for immunity purposes there is no distinction between municipalities and counties in cases involving airports authorized under the UAL. We must conclude, however, that when read in context of the surrounding case law and statutory framework, these cases stand for much narrower propositions.

An examination of the statutory bases of immunity for counties and municipalities reveals distinctly different provisions. County immunity is provided for in Ga. Code Ann. § 23-1502. "A county is not liable to suit for any cause of action unless made so by statute." While almost as succinct in its language, the provision for municipal immunity in Ga. Code Ann. §69-301 is not nearly so unequivocal. "Municipal corporations shall not be liable for a failure to perform, or for errors in performing, their legislative or judicial powers. For neglect to perform, or for improper or unskillful performance of their ministerial duties, they shall be liable."

The operational distinction between these statutes has long been recognized by the Georgia courts. The second sentence of the municipal immunity statute has been consistently read to waive immunity whenever a municipality undertakes a proprietary function. Thus, in *Ware County v. Cason*, 189 Ga. 78, 79, 5 S.E.2d 339 (1939), the Georgia Supreme Court held a county hospital immune to suit even though prior cases had found no immunity for city hospitals.

> There is a statute which, on the basis of distinction between governmental functions of municipal corporations and ministerial acts, inhibits municipal liability for damages flowing from breach of duty in regard to the former, and

> imposes municipal liability for breach of duty in regard to the latter. Code, § 69-301; *Cornelisen v. Atlanta*, 146 Ga. 416 (91 S.E. 415). But there is no such statute relating to counties and no statute making a county liable to suit for tort based on negligence in operating a hospital causing injury to a pay patient therein.

Accord, *Purser v. Dodge County*, 188 Ga. 250, 251-52, 3 S.E.2d 574 (1939).

It follows that the requirements for resisting immunity in cases involving municipal and county airports is significantly different. To sue a municipal airport, a plaintiff need only show that the operation of a municipal airport is a proprietary function; to sue a county airport, a plaintiff must show an express statutory waiver of immunity. When read in light of this distinction it becomes apparent that the extensive discussion of the UAL in *Caroway v. City of Atlanta*, 85 Ga.App. 792, 70 S.E.2d 126 (1952), was not intended to demonstrate that the statute waived immunity. Rather, the intent was to demonstrate that, despite language in the UAL which could have been read to say that the operation of airports is a governmental function, the operation of an airport is a proprietary function, and, accordingly, is susceptible to suit.

In *Southern Airways v. DeKalb County*, 102 Ga.App. 850, 118 S.E.2d 234 (1960), the court made considerable use of the proprietary function discussion in *Caroway*, but not, as suggested by the plaintiff, for the purpose of finding either that the UAL constitutes a statutory exception or that the county participation in a proprietary function waives immunity. Rather, the purpose of the court's inquiry into whether the operation of an airport constituted a proprietary function was to fit this case within the framework of a line of Georgia cases that allow County Commissioners to enter into binding contracts extending beyond their term of office only if the contract relates to a proprietary function of the county. *Id.* at 854-855, 118 S.E.2d 234.

On motion for rehearing the court in *Southern Airways* clarified its position as to the county's lack of immunity from suit on the contract. The court ruled that since the UAL expressly authorizes the county to contract, the logical inference of that statute is that the county may be sued for breach of contract. This is consistent with several other Georgia decisions which hold that statutory authority to contract is necessarily a statutory waiver of immunity to suit for breach. *Hancock County v. Williams*, 230 Ga. 723, 198 S.E.2d 659 (1973); *Deason v. DeKalb County*, 222 Ga. 63, 148 S.E.2d 414 (1966).

Finally, an examination of *Taylor v. King*, 104 Ga.App. 589, 122 S.E.2d 265 (1961), reveals that the language relied upon by the plaintiffs was taken out of context. The *Taylor* case involved alleged negligence by a municipal airport. Accordingly, it was necessary for the plaintiffs to demonstrate that operation of the airport was a proprietary function to avoid immunity. Relying on the *Caroway* and *Southern Airways* cases, the court concluded that the operation of this municipal airport was a proprietary function. In the course of its discussion of the *Southern Airways* case the court said: "For this purpose there is no distinction between municipal and county liability." The antecedent to which "this purpose" refers is not, however, determination of immunity, as suggested by the plaintiffs, but only determination of whether or not an airport is a proprietary function.[6] An examination of the Uniform Airports Law reveals no language that even vaguely suggests that the legislature intended to waive county immunity for negligence in the operation of airports. Having been cited no other statutory authority, we necessarily must conclude that the county is immune from suit on theory of negligence.

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[6] *See also, City of Macon v. Powell*, 133 Ga. App. 907, 908, 213 S.E.2d 63 (1975).

II

The second theory propounded by the plaintiffs is that the county is liable for special damages resulting from the maintenance of a nuisance. The district court overruled this theory, holding that in the absence of statutory authority to be sued, the county is immune under Ga. Code Ann. § 23-1502. In response, the plaintiffs assert that the requisite statutory authority to sue exists in Ga. Code Ann. § 72-103.

> Generally, a public nuisance gives no right of action to any individual. If a public nuisance shall cause special damage to an individual, in which the public did not participate, said special damage shall give a right of action.

In addition, they cite several Georgia cases holding a county liable for maintenance of a nuisance.

[2] Although several Georgia cases have held either a municipality or a county liable for a nuisance, none has cited § 72-103 as its authority for not holding the county immune. We could read this statute to create an exception to immunity only if we read "public nuisance" to mean a nuisance created or maintained by a public body. Ga. Code Ann. § 72-102, however, defines public and private nuisance in terms of who is affected and who is injured, not in terms of the perpetrator of the nuisance. Thus, it must be concluded, that § 72-103 does not create a statutory exception to the general rule of immunity. Rather, its function, like several comparable Georgia statutes,[7] is to create a cause of action for a particular kind of wrong.

There are, nevertheless, circumstances under which a county may be sued in nuisance. In both *Nalley v. Carroll County*, 135

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[7] *See, e. g.*, Ga. Code Ann. § 105-103 which creates a cause of action for an ordinary tort.

Ga. 835, 70 S.E. 788 (1911), and *DeKalb County v. McFarland*, 223 Ga. 196, 154 S.E.2d 203 (1967),[8] counties were held liable for flood damage caused by a county public works project. Neither case, however, made clear its basis for finding the counties susceptible to suit. In *Baranan v. Fulton County*, 232 Ga. 852, 209 S.E.2d 188 (1974), the Georgia Supreme Court clarified the situation. The counties were not immune in those cases because Article 1, § 3, para. 1 of the Georgia Constitution[9] provides that private property shall not be taken for public purposes without just and adequate compensation. The effect of the flooding was to take the plaintiffs' land for public purposes, thus creating an action for compensation under the Constitution, and accordingly, an exception to § 23-1502.[10]

[3] The injuries that occurred to the plaintiffs in the present case do not parallel those of the plaintiffs in *Baranan, McFarland*, or *Nalley*. In those cases land was rendere useless as the incidental result of a public project; the taking was an inevitable result of the public project, and the county knew or should have known that flooding would occur. The action was for compensation for land, the taking of which was necessary to the completion of the project. In this case, the injury to property resulting from the air crash is not a necessary and foreseeable consequence of maintaining a garbage dump and, consequently, not comparable to the flooding that results from river and drainage projects. Thus, we must conclude that there is no statutory exception under which these plaintiffs may sue the county for nuisance.

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[8] *See also*, later opinions in the *McFarland* case at 224 Ga. 618, 163 S.E.2d 827 (1968); 226 Ga. 321, 175 S.E.2d 20 (1970); 231 Ga. 649, 203 S.E.2d 495 (1974).

[9] Ga. Code Ann. § 2-301.

[10] *Accord Williams v. Ga. Power Co.*, 233 Ga. 517, 519, 212 S.E.2d 348 (1975).

We reach this conclusion despite a line of cases that hold municipalities liable for personal injuries resulting from a continuing nuisance. *Town of Ft. Oglethorpe v. Phillips*, 224 Ga. 834, 165 S.E.2d 141 (1968); *City of Blue Ridge v. Kiker*, 189 Ga. 717, 7 S.E.2d 237 (1940); *City Council of Augusta v. Cleveland*, 148 Ga. 734, 98 S.E. 345 (1919); *City of Gainesville v. Pritchett*, 129 Ga.App. 475, 199 S.E.2d 889 (1973).[11] These cases allow municipalities to be held liable in nuisance despite § 69-301. While the cases do not explain why the municipalities are not immune, it is clear from several opinions that it is not because they fall within the exception for proprietary functions. Instead, this line of cases must be read to be a common law exception to the general statutory rule expressed in § 69-301 that municipalities are immune. Such an exception cannot be created for counties, because § 23-1502 explicitly requires that exceptions to immunity be created by statute. In accord with this reading of *Town of Oglethorpe v. Phillips, supra*, is *Sheley v. Board of Public Education for City of Savannah and County of Chatham*, 132 Ga.App. 314, 317-18, 208 S.E.2d 126 (1974), *aff'd*, 233 Ga. 487, 212 S.E.2d 627 (1975), in which the Georgia Court of Appeals declined to apply the immunity exception of the *Ft. Oglethorpe* case to cases in which governmental subdivisions other than municipalities were sued in nuisance. See also, *Williams v. Ga. Power Co.*, 233 Ga. 517, 519, 212 S.E.2d 348 (1975). Accordingly, we hold that these cases do not create a cause of action in nuisance against counties.

III

[4] Finally, the plaintiffs seek to sue the county as third party beneficiaries to a contract between the Federal Aviation Administration (FAA) and DeKalb County. That contract provided for, among other things, the safe operation of the airport

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[11] *See also* Annot., 34 A.L.R.3d 1008, 1044-49 (1970).

and surrounding properties controlled by the county. The district court rejected this claim, holding that counties are immune from suit for breach of contract. In support of that conclusion they cite *Purser v. Dodge County*, 188 Ga. 250, 3 S.E.2d 574 (1939). That case, however, never reached the question. "The question certified does not involve a determination as to whether a county would be liable on a contract which the law might expressly or impliedly authorize it to make." *Id.* at 253, 3 S.E.2d at 575. It is now a well settled proposition of Georgia law that if a statute authorizes a county to contract, it also implicitly creates a cause of action for breach. Since the action against the county is authorized by statute, it is not barred by § 23-1501. *Hancock County v. Williams*, 230 Ga. 723, 724, 198 S.E.2d 659 (1973); *Deason v. DeKalb County*, 222 Ga. 63, 65, 148 S.E.2d 414 (1966); *Decatur County v. Praytor, Howton and Wood Contracting Company*, 163 Ga. 929, 933-34, 137 S.E. 247 (1927); *Southern Airways Co. v. DeKalb County*, 102 Ga. App. 850, 865, 118 S.E.2d 234 (1960) (on motion for rehearing). Since it is clear that DeKalb County may be sued for breach of contract, the only remaining question is whether the plaintiffs may sue as third party beneficiaries to the contract between DeKalb County and the FAA.

[5] Actions on contracts by third party beneficiaries are explicitly provided for by Ga. Code Ann. § 3-108. ". . . the beneficiary of a contract made between other parties for his benefit may maintain an action against the promisor on said contract." The case law interpreting this statute has, however, limited its application to intended beneficiaries, as distinguished from incidental beneficiaries. Compare *Robinson Explosives, Inc. v. Dalon Contracting Co.*, 132 Ga. App. 849, 851-52, 209 S.E.2d 264 (1974), with *Stewart v. Gainesville Glass Co.*, 131 Ga.App. 747, 752-53, 206 S.E.2d 857 (1974), *aff'd*, 233 Ga. 578, 212 S.E.2d 377 (1975). A typical situation under which a third party beneficiary cannot sue is presented by *Lee v. Petty*, 133 Ga.App. 201, 210 S.E.2d 383 (1974). In that case the plaintiffs attempted to sue Ware County under a contract between the county and a leasing company that required the county to obtain liability insurance. Merely because the plaintiffs would benefit from the existence of an insurance policy was not sufficient. The court held that "[w]ithout question there was no contemplation that the appellants [would] be beneficiaries under the terms of the contract and hence there is no basis for their recovering under this case." *Id.* at 206, 210 S.E.2d at 386. Since the purpose of the insurance clause was not to protect the public, but to determine responsibilities and liabilities between the parties, injured members of the public could not sue.

[6] The remaining question, therefore, is whether the safety provisions in the contract between DeKalb County and the FAA were intended to benefit the public. The county argues that such a showing is not sufficient; not only must the parties have intended to benefit the public, but they also must have intended to compensate members of the public who are injured as a result of a breach. Under Georgia law, however, it is well settled that a contract with a public body confers a benefit on the public if it is clear from the appropriate contractual provisions that the parties intended those provisions to benefit the public.

In *Smith v. Ledbetter Brothers, Inc.*, 111 Ga.App. 238, 141 S.E.2d 322 (1965), the defendant had entered into a road building contract with the state of Georgia. Included in that contract was an agreement that the defendant would "provide all safeguards, safety devices, and protective equipment and take any other needed actions, on his own responsibility or as the contracting officer may determine, reasonably necessary to protect . . . the safety of the public . . ." *Id.* at 239, 141 S.E.2d at 324. The plaintiff in that case alleged that the defendant was negligent in carrying out his contractual obligation to provide for the safety of the public, and that this negligence had resulted in the plaintiff's injury. The court held that the plaintiff could sue for this breach. "A contract between the State

Highway Department and a construction company by which the latter undertakes to provide for the safety of the public during the construction of the work inures to the benefit of the public, and a member of the public injured as a result of negligence in failing to do so may sue the contracting party directly." *Id.* at 240, 141 S.E.2d at 324. Accord *M. R. Thomason and Associates, Inc. v. Wilson*, 125 Ga.App. 658, 661-62, 188 S.E. 2d 805 (1972). The court did not discuss whether the parties contemplated creating a cause of action for the public. The mere creation of a contractual duty for the public's benefit necessarily created a cause of action in the public for its breach.

[7] The situation and contracts presently before the court are quite similar to those in the construction cases. DeKalb County's contract with the FAA provides that the county will operate the airport for the use and benefit of the public, will operate and maintain it in a safe and serviceable condition, and will limit use of adjacent land so that it will not interfere with the safe use of the airport.[12] The county breached this contractual duty, and as a result of that breach the plaintiffs were injured. We hold that these contractual provisions inured to the benefit of the public, and, accordingly, the plaintiffs may sue for breach.

IV

[8, 9] Some of the plaintiffs also argue that the purchase of an insurance policy by the county creates a cause of action. Georgia law, however, has consistently held that the purchase of liability insurance by a county, even if the policy contains an explicit clause prohibiting the insurance company for pleading the immunity of the county, neither waives the immunity of the

[12] *See* Project Application, Sponsor's Assurances, paragraphs 2, 6, 7, and 13 (appearing in the appendix of No. 74-3870, *Fireman's Fund Insurance Co. v. United States*, at 80-81). The Project Application is incorporated into the Grant Agreement by reference (appearing in Appendix, *supra*, at 62).

county from suit, nor creates a direct action against the insurer. *Arnold v. Walton*, 205 Ga. 606, 611-14, 54 S.E.2d 424 (1949); *Revels v. Tift County*, 235 Ga. 333, 335, 219 S.E.2d 445 (1975); *Lee v. Petty*, 133 Ga. App. 201, 205-06, 210 S.E.2d 383 (1975).

In conclusion, we hold that DeKalb County is susceptible to suit on theory of breach of contract and that all of the plaintiffs may sue as third party beneficiaries to the contract between DeKalb County and the FAA. All other actions are barred by the immunity of the county. Accordingly, we reverse.

DYER, Circuit Judge (dissenting):

Although I agree with the majority's conclusion that DeKalb County is immune from suit for negligence and nuisance, I disagree with their conclusion that the county can be held liable by plaintiffs as third-party beneficiaries of the Federal Grant Agreement between the United States and the county. At most, plaintiffs are incidental beneficiaries of that agreement, not entitled to recover for breach of contract.

At the outset, the majority errs by looking to Georgia law in determining whether plaintiffs are third-party beneficiaries.[1] Although jurisdiction here is based upon diversity, the contract we are interpreting is one in which the United States is a party, and one which is entered into pursuant to authority conferred by federal statute. The necessity of uniformity of decision demands that federal common law, rather than state law, control the contract's interpretation. *United States v. Seckinger*, 1970, 397 U.S. 203, 90 S.Ct. 880, 25 L.Ed.2d 224; *Smith v. United*

[1] Even if Georgia law should apply, the result would not be different. The majority recognizes that under Georgia law, only *intended*, and not *incidental* beneficiaries, may recover for breach of contract. As will be shown in this dissent, nothing in the grant agreements or the underlying statutes raises the status of the plaintiffs from incidental to intended beneficiaries.

States, 5 Cir. 1974, 497 F.2d 500; *First National Bank v. Small Business Administration*, 5 Cir. 1970, 429 F.2d 280.[2]

Federal cases considering the question of when members of the public at large are third-party beneficiaries of a contract to which the United States is a party are few in number. However, those cases support the position of the Restatement of Contracts, § 145, that such members of the public can recover damages under a contract with the United States to which they are not a party only when the contract manifests an intention that they be so compensated.[3] *West v. Morrison-Knudsen Company*, 9 Cir. 1971, 451 F.2d 493 (Injured employee of subcontractor is not third-party beneficiary of safety provisions of prime contract between United States and general contractor); *Hensley v. United States*, D.Mont.1968, 279 F.Supp. 548 (same);

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[2] As stated in *Clearfield Trust Co. v. United States*, 1943, 318 U.S. 363, 367, 63 S.Ct. 573, 575, 87 L.Ed. 838:

> The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain.

Even though we are here considering the liability of parties other than the United States, this same consideration controls, for if plaintiffs are third party beneficiaries with respect to the obligations of the county under the contract, then they would also be third-party beneficiaries with respect to the obligations of the United States.

[3] Restatement of Contracts, § 145, provides in pertinent part:

> A promisor bound to the United States or to a state or municipality by contract to do an act or render a service to some or all of the members of the public, is subject to no duty under the contract to such members to give compensation for the injurious consequences of performing or attempting to perform it, or of failing to do so, unless,
>
> (a) an intention is manifested in the contract, as interpreted in light of the circumstances surrounding its formation, that the promisor shall compensate members of the public for such injurious consequences. . . .

Brotherton v. Merritt-Chapman & Scott Corp., 2 Cir. 1954, 213 F.2d 477 (provision in contracts requiring contractors to cooperate with one another was for benefit of government, and contractor could not recover from another as third-party beneficiary of that provision). *See also Johnson v. Redevelopment Agency*, 9 Cir. 1963, 317 F.2d 872; *Mahler v. United States*, 3 Cir. 1962, 306 F.2d 713; *Housing Corp. of America v. United States*, Ct. of Claims 1972, 468 F.2d 922, 199 Ct.Cl. 705; *Sayre v. United States*, N.D. Ohio 1967, 282 F.Supp. 175. It is not enough that the contract confer a benefit on the public at large.

Plaintiffs claim they are third-party beneficiaries of certain broad assurances made by the county and contained in the grant agreement, to the effect that the county will operate the airport safely and will control surrounding airport hazards.[4] However, these contract assurances appear to be nothing more than the assurances required by 49 U.S.C.A. § 1110.[5] I can

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[4] These assurances provide in pertinent part:

> The Sponsor will operate and maintain in a safe and serviceable condition the Airport and all facilities thereon and connected therewith which are necessary to serve the aeronautical users of the Airport other than facilities owned or controlled by the United States, and will not permit any activity thereon which would interfere with its use for airport purposes.
>
> In addition, the Sponsor will not erect or permit the erection of any permanent structure or facility which would interfere materially with the use, operation, or future development of the Airport, . . .
>
> Insofar as is within its power to the extent reasonable, the Sponsor will take action to restrict the use of land adjacent to or in the vicinity of the Airport to activities and purposes compatible with normal airport operations including landing and takeoff of aircraft.

[5] 49 U.S.C. § 1110 provides in pertinent part:

> As a condition precedent to his approval of a project under this chapter, the Administrator shall receive assurances in writing, satisfactory to him, that
>
> . . . . . .

find nothing in the language of the contract or the legislative history of 49 U.S.C.A. § 1110 to indicate that the purpose of these assurances was to create a cause of action on behalf of injured third-parties. In fact, the only remedy provided in the grant agreement for breach of these assurances is termination of the grant by the United States. As in *United States v. Mahler, supra*, it appears that the only purpose of these assurances was to make sure that federal funds were effectively employed and not wasted.

Other courts, in considering third-party claims under the Federal Airport Act, 49 U.S.C.A. § 1101 et seq., and the various agreements and assurances entered into pursuant to that act, have concluded that, although the act might incidentally benefit users of airports, both airlines and passengers, the primary purpose of the act was to establish a nationwide system of public airports adequate to meet the present and future needs of civil aviation. *Port of New York Authority v. Eastern Air Lines, Inc.*, E.D.N.Y. 1966, 259 F.Supp. 745; *San Francisco v. Western Air Lines, Inc.*, 1962, 204 Cal. App.2d 105, 22 Cal.Rptr. 216; *Eastern Air Lines v. Town of Islip*, 1962, Sup., 229 N.Y.S.2d 117. There is nothing to indicate an intent to compensate members of the public injured through the use of the airport.

The majority finds that "not only must the parties have intended to benefit the public, but they also must have intended

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(2) such airport and all facilities thereon or connected therewith will be suitable operated and maintained, with due regard to climatic and flood conditions;

(3) the aerial approaches to such airport will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards;

. . . . . .

to compensate members of the public who are injured as a result of a breach." I find no support for the second conclusion. It is based not on the language of the contract or the legislative history, but merely on a relatively few state cases which, as outlined above, are not controlling. I am unwilling to create a cause of action based on such a thin thread. I would therefore affirm the judgment of the district court.

APPENDIX C

In the United States District Court for the Northern District of Georgia, Atlanta Division

George Henson Miree, et al.
vs.
United States of America, et al.
} Civil Action No. 19293

ORDER

(Filed in Clerk's Office September 25, 1974)

This action was brought by George Miree, Claude Miree, and Dorothy Miree through their co-guardians against the United States of America, DeKalb County, Georgia, Machinery Buyers Corporation, and Southeast Machinery, Inc. for the death of their parents. In a prior order of this court, *Miree v. United States*, Civ. No. 19293 (N.D. Ga., June 27, 1974), DeKalb County was dismissed as a party defendant for plaintiffs' failure to state a claim. Fed.R.Civ.P. 12(b)(6). This court rested its decision upon DeKalb County's governmental immunity from suit. The case is now before the court on the motion of Southeast Machinery, Inc. and Machinery Buyers Corporation for reconsideration of this ruling.

Briefly stated, the case arises out of an aircraft crash which occurred shortly after takeoff from the DeKalb-Peachtree Airport in DeKalb County, Georgia. All persons aboard the aircraft were killed, including plaintiffs' parents. The complaint alleges that numerous birds swarmed over the airport and adjacent garbage dump maintained by DeKalb County, and that the turbine engines of the aircraft ingested a large number of these birds resulting in the sudden loss of power in both engines and the crash of such aircraft. Based upon these allega-

tions, plaintiffs claim that both the United States and DeKalb County were negligent in the maintenance and operation of the airport. It was further alleged that DeKalb County is liable for a public nuisance in the maintenance of a garbage dump near the airport and that plaintiffs as third-party beneficiaries may recover for DeKalb County's breach of a contract with the United States in failing to adequately maintain the airport for the benefit of the public. To these claims DeKalb County filed a motion to dismiss which this court granted. Although various arguments were raised by the parties, the court determines the basic issue to be whether plaintiffs' claims are maintainable against DeKalb County in light of the doctrine of governmental immunity.

Pursuant to statutory authority, counties in Georgia enjoy the cloak of governmental immunity. *See Seymore v. Elbert County*, 116 Ga. 371 (1902). Ga. Code § 23-1502 provides that "[a] county is not liable to suit for any cause of action unless made so by statute." Consistent with this statute, the Georgia courts have required parties filing suit against a county to show the appropriate statutory authority allowing a claim. As was stated in *Millwood v. DeKalb County*, 106 Ga. 743 (1899):

> The county, being a political division of the state is not liable to be sued, unless special authority can be shown, and it is incumbent upon the person filing the suit to bring his case within the legislative authority upon which he relies to bring suit.

Id. at 747. Notwithstanding this interpretation, the movants, relying upon *Caroway v. City of Atlanta*, 85 Ga.App. 792 (1952), *Taylor v. King*, 104 Ga.App. 589 (1961), and *Southern Airways Co. v. DeKalb County*, 102 Ga.App. 850 (1960), urge this court to adopt the view that a county can be held accountable when acting in a proprietary capacity such as DeKalb County's operation of the DeKalb-Peachtree Airport. Although

the court sympathizes with this view, it cannot so read the cited cases. Both *Caroway* and *Taylor* involved suits against municipalities which have distinctive liabilities not applicable to counties. *Ware County v. Cason*, 189 Ga. 78 (1939). This distinctive liability is set forth in Ga. Code § 69-301 which provides that municipalities shall be liable for "improper or unskillful performance of their ministerial duties . . ." *See generally Troup County Electric Membership Corp. v. Georgia Power Co.*, 229 Ga. 348 (1972). Neither the statutes or Georgia courts have made such a distinction between governmental and proprietary functions with respect to a county's liability under facts such as are presented here. As was clearly stated in *Ware County v. Cason*, 189 Ga. 78, 79 (1939):

> There is a statute which, on the basis of distinction between governmental function of municipal corporations and ministerial acts, inhibits municipal liability for damages flowing from breach of duty in regard to the former, and imposes municipal liability for breach of duty in regard to the latter. (citations omitted). But there is no such statute relating to counties and no statute making a county liable to suit for tort based on negligence in operating a hospital . . .

Movants further argue that in *Southern Airways* the Georgia court is moving away from the traditional doctrine of governmental immunity. The court cannot agree. *c.f. Crowder v. Department of State Parks*, 228 Ga. 436 (1971); *see Sheley v. Board of Public Education for the City of Savannah and the County of Chatham*, No. 49044 (Ga.Ct.ofApp. 1974). Although there is more language in *Southern Airways* which supports movants' position, the case involved merely a declaration of rights of the parties under a lease agreement. This is a reiteration of the rule set out in *Decatur County v. Prayton, Howton & Wood Contracting Co.*, 163 Ga. 929, 934 (1927), that

> [w]henver a county . . . is authorized by statute to contract, and in pursuance of such power does contract, then an action will lie against it to enforce such liability . . . although there is no statute authorizing the bringing of an action for such purpose.

This court also finds that movants' reliance upon *DeKalb County v. McFarland*, 223 Ga. 196 (1967), is misplaced. *McFarland* fell within the Georgia constitutional provision holding a county liable for damage to private property taken for public uses, *see* Ga. Code § 2-301; *Smith v. Floyd County*, 85 Ga. 420 (1890), and is distinguishable. Accordingly, the court reaffirms its prior holding that plaintiffs' claim of damages resulting from the alleged nuisance fails to set forth a claim against DeKalb County. *State Highway Department v. Barrett*, 124 Ga.App. 703 (1971); *Crowder v. Department of State Parks*, 228 Ga. 436 (1971); *Sheley v. Board of Public Education for the City of Savannah and the County of Chatham*, No. 49044 (Ga.Ct.of App. 1974).

For the foregoing reasons, the motion of Southeast Machinery and Machinery Buyers Corporation to set aside the prior order dismissing DeKalb County having been considered, it is hereby DENIED.

Inasmuch as the question of DeKalb County's liability to suit involves a controlling question of law upon which the respective liabilities of the parties rest, and there appear to be substantial grounds for differing opinions, an immediate appeal from this order will materially advance the ultimate determination of the litigation. For this reason the court sees no just reason for delay and directs the Clerk to enter final judgment dismissing DeKalb County from this case.

IT IS SO ORDERED this 24th day of September, 1974.

WILLIAM C. O'KELLEY
United States District Judge

Final Judgment Pursuant to Rule 54(b)

An Order having been signed by Judge William C. O'Kelley on June 27, 1974 and filed in the Clerk's office on June 27, 1974 granting the motion of Defendant DeKalb County to dismiss the complaint for failure of plaintiffs to state a claim, further, the motion by Defendants Southeast Machinery and Machinery Buyers Corporation to set aside prior order dismissing DeKalb County filed on July 3, 1974, having been denied by Order of the Court dated filed on September 25, 1974, the Court having directed entry of final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, and thus having certified that there is no just reason for delay, and expressly directing entry of final judgment on said complaint against the plaintiffs, it is

ADJUDGED that the action be dismissed as to the Defendant DEKALB COUNTY, that the plaintiffs, GEORGE HENSON MIREE, CLAUDE ESTES MIREE and DOROTHY ESTES MIREE, Minors, by and through AUBREY S. MIREE, JR. and CLAUDE H. ESTES, JR., Co-Guardians of said Minors, take nothing and that the taxation of costs in the action shall await entry of final judgment as to all defendants.

This 25th day of September, 1974.

APPENDIX D

United States District Court
Northern District of Georgia
Atlanta Division

George Henson Miree, et al.,	Civil Action
vs.	No. 19293
United States of America, et al.	

ORDER

(Filed in Clerk's Office June 27, 1974)

This action was brought by George Miree, Claude Miree, and Dorothy Miree through their co-guardians against the United States of America, DeKalb County, Georgia, Machinery Buyers Corporation, and Southeast Machinery, Inc. for the wrongful death of their parents. Jurisdiction exists in the action against the United States pursuant to the Federal Tort Claims Act, 28 U.S.C. § 1346(b)[1], and in the action against DeKalb County, Machinery Buyers Corporation, and Southeast Machinery, Inc. pursuant to 28 U.S.C. § 1332.[2] The case is now before the

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[1] 28 U.S.C. § 1346(b) provides in part:

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or admission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

[2] 28 U.S.C. § 1332 provides in part: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds $10,000 . . . and is between—(1) citizens of different states . . ."

Court on defendant DeKalb County's motions to strike and dismiss the plaintiffs' complaint. Also before the Court is plaintiffs' motion to amend the complaint to add a party and to compel discovery.

The case arises out of an aircraft crash which occurred shortly after takeoff and approximately two miles southwest of the DeKalb-Peachtree Airport in DeKalb County, Georgia. All persons aboard were killed, including plaintiffs' parents. A short time after the crash, there were found the remains of several dead birds near the end of the airport runway from which the aircraft departed. Also discovered were numerous birds swarming over the airport and the adjacent garbage dump, maintained by defendant DeKalb County. The complaint alleges that the turbine engines of the aircraft ingested a large number of these birds, resulting in the sudden loss of power in both engines and the crash and total destruction of said aircraft. The plaintiffs claim that the United States, through its agency, the Federal Aviation Administration, and defendant DeKalb County, knew of the existing bird hazard at the airport, in that, such bird hazard had existed for a substantial period of time prior to the crash. Notwithstanding this knowledge, defendants failed to warn and notify jet pilots of the dangerous and unsafe bird hazard that was in existence and negligently failed to take adequate precautions and safeguards to prevent birds from contacting flying aircraft. Based upon these allegations, the plaintiffs claim that both the United States and DeKalb County were negligent in the maintenance and operation of the airport. It is further alleged that DeKalb County is liable for a public nuisance in the maintenance of a garbage dump near the airport and the plaintiffs as third-party beneficiaries may recover for breach of a contract with the United States in failing to adequately maintain the airport for the benefit of the public.[a]

[a] There is now pending in this Court five additional cases related to the Lear Jet crash near DeKalb-Peachtree Airport on February 26, 1973: (1) *United States of America v. A. C. Guhl,* Civ. No. 17968 (N.D. Ga., 1973), which involves an attempt by the United States to prohibit DeKalb County from continuing to maintain a hazard near an airport in the form of a garbage dump; (2) *Fields v. United States,* (N.D. Ga., Filed Feb. 20, 1974), which involves a person entering his automobile and burned by the crash of the Lear Jet. These cases will be consolidated with the present action for discovery purposes; (3) *Fireman's Fund Insurance Company v. United States of America,* Civ. No. C74-24A (N.D. Ga. filed Feb. 20, 1974), which involves a property damage claim filed by the insured of the Lear Jet to recover for the total destruction of the aircraft and; (4) *Chaisson v. Southeast Machinery, Inc.,* Civ. No. 74-915 (N.D. Ga., filed May 10, 1974), for property damage caused by the air crash, and, (5) *Phillips v. United States,* Civ. No. 19412 (N.D. Ga. Nov. 28, 1973) which involves a wrongful death claim by the wife of co-pilot of the aircraft.

I. Plaintiffs' Motion to Amend and Add a Party

Plaintiffs have moved to amend their complaint adding American Home Assurance Company as a defendant. Inasmuch as this Court has granted a motion to dismiss a similar claim against American Home Assurance Company in *Fields v. United States of America,* Civ. No. 74-291 (N.D. Ga., June 27, 1974), the Court will deny the motion to add a defendant.

In *Nelms v. State Farm Mutual Automobile Insurance Co.,* 463 F.2d 1190 (5th Cir. 1972), the Fifth Circuit, faced with the question of whether one can directly sue an insurance company in a Texas District Court based upon a Louisiana "direct action" statute, stated:

> The question of whether or not a direct action against an insurer is permitted is sufficiently determinative of the outcome of a trial that a Federal Court sitting in diversity jurisdiction must follow State law in making its decision.

Id. at 1191. Accordingly, it follows that this Court must apply the law of Georgia in ruling on this motion.

The insurance contract in question was issued to the Board of Commissioners of DeKalb County as the insured. This policy

contained what is commonly known as a "no-action" clause providing in part:

> No action shall lie against the company . . . until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement between the insured, the claimant and the company . . . Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability.

In the case of *Arnold v. Walton*, 205 Ga. 606 (1949), the Georgia Supreme Court ruled on a suit against an insurance company which contained a similar "no-action" clause. The Court found no Georgia statute allowing the joinder of a tortfeasor with the indemnity company in the same action. It further held that there is no law which permits "the bringing of the action against the insurance company alone, without the liability of the insured having been fixed by judgment or by settlement under the terms of the contract." *Id.* at 613. By the terms of the present policy, the contract is between the insured and the insurance company only. There appears to be no intent to directly benefit the public. Likewise, as the Court interprets the waiver clause, it was not for the public's protection but rather for the County's protection against the raising of such defense once judgment had been entered against it.

Accordingly, this Court finds that plaintiff has no present claim against American Home Assurance Company and hereby denies its motion to amend.

II. **Plaintiffs' Discovery Motions**

Plaintiffs have filed a motion to require DeKalb County to answer certain of plaintiffs' first interrogatories and to determine the sufficiency of DeKalb County's objection to plaintiffs' request for admissions. These motions are denied, without prejudice to refile, for failure to comply with Local Court Rule 91.6.

III. **Motion to Strike**

Defendant DeKalb County has moved to strike various paragraphs of plaintiffs' complaint for failing to state a claim either in negligence, nuisance, or for breach of contract. The Court particularly notes that defendant's motion to strike is based upon the ground that portions of plaintiffs' complaint fail to state a claim upon which relief may be granted. Such a ground for a motion to strike is clearly inappropriate under Fed.R.Civ.P. 12(f). The purpose of rule 12(f) is to simplify and limit the pleadings by an elimination of any "insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." *See Nuccio v. General Host Corp.*, 53 F.R.D. 234 (E.D. La. 1971). The defendant fails to enumerate these grounds in its motion. The substantive arguments made by defendant are more appropriately made in a motion to dismiss under rule 12(b)6 and will be treated as such by the Court. Accordingly, the request to strike is denied.

IV. **Motion to Dismiss**

The plaintiffs' complaint, as it pertains to DeKalb County, bases an alleged right of recovery on the theories of nuisance, negligence, and breach of contract. To these claims DeKalb County has filed a motion to dismiss for failure to state a claim. Fed.R.Civ.P. 12(b)6. Although various arguments are raised by the parties, the Court determines the basic issue to be whether plaintiffs' claims are maintainable against DeKalb County in light of the doctrine of governmental immunity as it exists in Georgia. This issue will be discussed in the context of plaintiffs' claims.

A. **Nuisance.**

Plaintiffs contend that DeKalb County is guilty of the maintenance of a public nuisance—a garbage dump adjacent to and contiguous with the airport; that DeKalb County knew and realized for a significant period of time that said nuisance constituted a hazard to aircraft landing and departing from the airport and that as a result of said nuisance special damage has been sustained by plaintiffs through the death of their parents. In response to these contentions the defendant urges that Ga. Code § 23-1502 bars any action against a county for maintenance of a nuisance.

Pursuant to statutory authority, counties in Georgia enjoy the cloak of governmental immunity. Ga. Code § 23-1502 provides that "[a] county is not liable to suit for any cause of action unless made so by statute." With this statutory basis the Georgia courts have required the party filing suit to show the appropriate statutory authority allowing a claim. As stated in *Millwood v. DeKalb County*, 106 Ga. 743 (1899):

> The county, being a political division of the state is not liable to be sued, unless special authority can be shown, and it is incumbent upon the person filing the suit to bring his case within the legislative authority upon which he relies to bring suit.

Id. at 747. *See also Seymore v. Elbert County*, 116 Ga. 371 (1902); *Anderson v. DeKalb County*, 107 Ga.App. 328 (1963); *Ayers v. Franklin County*, 73 Ga.App. 207 (1945). This view was recently reaffirmed in the revised opinion of *Sheley v. Board of Public Education for the City of Savannah and the County of Chatham*, No. 49044 (Ga. Ct. of App., June 19, 1974), decided by the Georgia Court of Appeals. In *Sheley* the plaintiff brought suit against the Board of Education for Chatham County to recover for her child's death, allegedly caused by falling into an open septic tank located on school property.

In ruling upon a motion to dismiss, the Court, in its revised opinion, refused to allow a nuisance or negligence claim against governmental subdivisions other than municipalities. This holding appears to be in accordance with the rulings of the Georgia Supreme Court. *Cf. Crowder v. Department of State Parks*, 282 Ga. 436 (1971).

Plaintiffs' reliance upon *Nalley v. Carroll County* 135 Ga. 835 (1911), and *DeKalb County v. McFarland*, 223 Ga. 196 (1967), appears to be misplaced. Both cases fall within the constitutional provision holding a county liable for damages to private property taken for public uses. *See* Ga. Code § 2-301. These suits are expressly authorized and fall within the statutory exception provided for in Ga. Code § 23-1502, *See Purser v. Dodge County*, 188 Ga. 250 (1939), and are not applicable to the present case.

B. **Breach of Contract.**

Plaintiffs, in their complaint, contend that DeKalb County executed six Federal Grant Agreements with the United States. Pursuant to the terms of these agreements DeKalb County obligated itself to perform certain duties with regard to the use and maintenance of the airport, as well as the land adjacent thereto. Plaintiffs further averred that DeKalb County violated this agreement by permitting a garbage dump to be maintained in the vicinity of the airport. As a consequence of the breach of this contract, plaintiffs' parents lost their lives in an attempt to take off from the airport. Based upon these allegations, plaintiffs claim that their parents were third-party beneficiaries to the Grant Agreement and that they may now maintain an action against DeKalb County for breach of contract.

Although the party's briefs discuss the question of the intent of each party to create third-party beneficiary rights, the Court conceives the issue to be much narrower *i.e.* whether sovereign

immunity acts as a bar to suit against the county for breach of its contract with the Federal Government. This question appears to have been answered in *Purser v. Dodge County*, 188 Ga. 251 (1939). In *Purser* a question was certified to the Georgia Supreme Court on whether a county was liable in damages to a highway traveler caused by the negligence of the county in performing its contract with the State Highway Department for paving of a highway. *Id.* at 251. The Court after discussing the effect of the doctrine of governmental immunity on suits against counties for their negligence concluded:

> [T]here is no constitutional or statutory provision which can be taken to render a county liable for a tort on account of personal injuries arising from a defect in a highway constructed or maintained by the county; and this is true irrespective of whether the construction or repairs of the highway was done in the performance of the county's own governmental functions in maintaining its system of highways, *or whether it was done, as stated in the certified question, under a contract made by the county with the State Highway Department solely for pecuniary gain.* (emphasis added).

Id. at 252.

Inasmuch as this Court must follow the law of Georgia in this diversity suit, the Court finds that any claim by plaintiffs for damages resulting from the breach of the contract between DeKalb County and the United States is barred by governmental immunity. By so holding, it is unnecessary for the Court to reach the question of whether plaintiffs can recover as a third-party beneficiary under the contract in question.

C. **Negligence**

The plaintiffs' remaining claim against DeKalb County is based upon negligence in the operation and maintenance of

the DeKalb-Peachtree Airport. As previously discussed with regard to the nuisance allegation, the doctrine of governmental immunity bars this claim. Nevertheless, plaintiffs, relying upon *Caroway v. City of Atlanta*, 85 Ga.App. 792 (1952), and *Taylor v. King*, 104 Ga.App. 589 (1961), urges that a county can be held accountable for negligence when acting in a ministerial or proprietary function. Both *Caroway* and *Taylor* involved municipalities which have distinctive liabilities in Georgia not applicable to counties. In *Troup County Electric Membership Corp. v. Georgia Power Co.*, 229 Ga. 348 (1972), this distinction was explained.

> 'Counties are subdivisions of the State Government to which the state parcels its duty of governing the people (citations omitted). They are local, legal, political subdivisions of the State . . . administrating locally the general powers and policies of the State . . .'. On the other hand, municipalities are creatures of the Legislature, and their existence may be established, altered, amended, enlarged or diminished, or utterly abolished by the legislature. Id. at 352.

See also Purser v. Dodge County, 188 Ga. 250 (1939); *Sheley v. Board of Public Education for the City of Savannah and the County of Chatham*, No. 49044 (Ga. Ct. of App., 1974); *Ware County v. Carson*, 189 Ga. 78 (1939). This distinction raises a constitutional question as a defense to the motion to dismiss. In this regard, the plaintiffs contend that *Ga. Code* §23-1502 as applied to their action against DeKalb County is unconstitutional as violative of the equal protection and due process clauses of the United States and Georgia Constitution. It is specifically alleged that §23-1502 draws a classification between those persons injured by a municipality's negligence in the operation of an airport and those persons injured by a county in its operation of an airport. The Georgia courts hold that a municipality is not immune from claims for its negligence in the operation of an airport. *See Delta Air Corpora-*

tion v. Kersey, 193 Ga. 862 (1942); *Taylor v. King*, 104 Ga. App. 589 (1961). It is urged that this line of classification discriminates against persons injured by the county with the imposition of the bar of governmental immunity to their actions.

In order for a law to be in violation of the equal protection clause of the fourteenth amendment the state law must be shown to be arbitrary and without reasonable basis: *See Lindsey v. Normet*, 405 U.S. 56 (1972). Thus, even though a statute has the effect of discriminating against a certain class, the law is not arbitrary and violative of equal protection if the discrimination is founded upon a reasonable distinction. Laws similar in scope and effect as the one challenged in the present action have been upheld as a valid exercise of state power. In *Meyerhoffer v. East Hanover Township School District*, 280 F.Supp. 81 (M.D. Penn. 1958), the Court granted immunity from tort liability to a school district for negligent injury to a pupil during the operation of a school bus. This was found not to deny equal protection of the law to the plaintiff notwithstanding the fact that by state statute all owners of private vehicles employed in transporting pupils were required to carry public liability insurance and were liable for their negligence. *See also McDaniel v. Baptist Memorial Hospital*, 469 F.2d 230 (6th Cir. 1972); *Weeks v. Children's Hospital of Philadelphia*, 200 F.Supp. 77 (E.D. Pa. 1961). Likewise, in the present case the Court finds the classification to be based upon a reasonable legislative purpose. The Georgia courts consistently have held that the county is created "as an arm of the state." *See Troup County Electric Membership Corp. v. Georgia Power Co.*, 229 Ga. 348 (1972). As such, they carry the state's burdens and responsibilities within their respective localities. On the other hand, a municipality, as a legislative creation, can select its available powers, rejecting those liabilities inapplicable to its particular purpose. Undoubtedly, the differentiation in respective liabilities premised on this distinction is reasonable. While it must be conceded that DeKalb

County has by operating an airport extended its activities into areas beyond its traditional function, this Court is unable to find that the distinctive classification is totally unrelated to the purpose of §23-1502. Likewise, finding the classification to be reasonable, the plaintiffs' due process claim is also without merit. The result reached in this case under the Federal Constitution is also applicable to the plaintiffs' argument under the Georgia Constitution. *See Crowder v. Department of State Parks*, 228 Ga. 436 (1971), *cert. denied*, 406 U.S. 914 (1972).

In summary, the Court (1) denies DeKalb County's motion to strike portions of plaintiffs' complaint, (2) grants DeKalb County's motion to dismiss plaintiffs' complaint as to its claims of negligence, nuisance and for breach of contract, (3) denies the plaintiffs' motion to amend the complaint, and (4) denies the plaintiffs' discovery motions without prejudice to refile.

It Is So Ordered this 27th day of June, 1974.

/s/ WILLIAM C. O'KELLEY
United States District Judge